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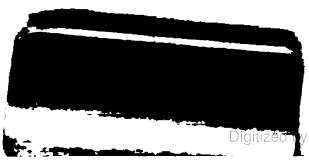

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THE

CANADIAN LAW TIMES

Edited by

E. DOUGLAS ARMOUR,

Of Osgoode Hall, Barrister-at-Law.

VOL. I.

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INTRODUCTORY.

IN placing the first number of the CANADIAN LAW TIMES before the Profession, the Editors beg to say a few introductory words.

The enterprise was undertaken with great diffidence, on account of the limited number of professional men who can devote their time to writing, and the consequent difficulty of procuring a constant supply of good reading matter to put into the hands of the Profession. Men of large experience and extensive knowledge have, as a general rule, no time to devote to contributing to a Journal; and, *per contra*, as the circulation of a professional publication is limited, and the income therefore restricted, publishers cannot afford to offer a sufficient pecuniary inducement to such men to forsake more active pursuits for the editorial staff. Again, it is not every man of extensive knowledge who has the faculty of expressing himself in terse language —nor is it every man who has a talent or a taste for writing, whose pen may be useful to the profession. In finding men of diligence, with leisure for research, and with a taste for authorship—men who are generous too, and content to sacrifice a little in furthering a good object, the Editors had a problem laid before them whose practical solution seemed difficult enough. Notwithstanding this, they are pleased to say that they have, even at this early period, found men who were ready to come forward, and who from a pure desire to see established a creditable publication, have been unfailing in their efforts to assist in laying the foundation.

The Editors take this opportunity of expressing publicly their appreciation of the vigour and generosity with which these gentlemen (several of them eminent in the Profession) have set about assisting in the work of establishing the Journal. Their assistance cannot be too highly valued,

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and we have much pleasure in thus tendering our hearty thanks.

As the publishers have already stated in their Prospectus, the enterprize was undertaken to endeavour to meet the views of a number of the Profession outside of Toronto; but, as it was beyond their power to ascertain with any degree of certainty the individual opinions of the Profession on the subject, or even to gather a sufficient amount of *data* upon which to base their estimates, a certain degree of hazard marked the inception of the undertaking.

Any doubts that were entertained as to how the CANADIAN LAW TIMES would be received, have since the project has been made public been totally dispelled, and in all quarters the best wishes for, and the most unqualified assurances of, success have been given us.

Having premised these few words, we may proceed to give a short forecast of our intended future. It was the original intention to make the publication a Law Review or Magazine; but, on due deliberation, it was concluded that sufficient support could not be obtained for a Review or Magazine pure and simple. Consequently, the Editors decided to adopt the Magazine form, but to publish all news of interest to the Profession, all communications that might be addressed to them for publication, reports of cases not to be found elsewhere, and abstracted notes of recent decisions. With this view they have adopted the comprehensive title—CANADIAN LAW TIMES.

If sufficient support be given, as time goes on, it will be the endeavour of the Editors to conform strictly to the original intention, and to make the CANADIAN LAW TIMES strictly a Magazine and Review.

With regard to reports of cases not elsewhere published, the Editors may say that, without question, many important decisions are rendered by the Judges of the County Courts which never reach the Profession, (except those

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immediately interested), unless they happen to come before the Court of Appeal. The Editors will be glad to receive notice of such decisions, in order that publicity may be given to them. And they hope that, besides the benefits that will accrue to the Profession from their perusal, their proposed publication may tend to establish greater uniformity of decision among the County Courts than at present prevails.

With the first number comes the beginning of a Digest of selected cases on Criminal Law. The cases are selected at random from English, American and Canadian authorities, and are chosen, not with a view of exhaustively digesting any set of Reports, nor of collecting *all* cases that can be found bearing upon the different heads of Criminal Law and Practice, but solely on account of their peculiarity and striking characteristics, and of their undoubted practical usefulness. It is hoped that this will be the means of giving the Profession ready access to the current of modern legal thought on the Criminal Law, and that in this Digest the practitioner may have a handy book of striking points in Criminal Law.

On matters of importance to the Profession, the Editors will always be glad to receive communications. They cannot undertake, however, to become consulting counsel to the Profession upon doubtful points of Law and Practice; but to meet the views of such as desire to address themselves to the CANADIAN LAW TIMES on doubtful points, or for information not immediately within reach of the Editors, they will reserve a department for queries and answers, so that any one desiring to do so may answer a query through the same column.

With regard to contributors, of course the Editors in general look to the Profession at large for their supply of leading articles. It could not be expected, nor would it be desirable, that the editorial staff—necessarily a limited one—should furnish all the leading articles. Upon their shoulders falls the burden of compiling and arranging

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matter for publication, and their labour is continuous; so that even if it were desirable that they should employ their pens constantly upon leaders, it would be impossible for them to do so. They therefore hope that sufficient interest will be taken in the Journal to induce those who have a talent for writing to offer contributions.

The list of contributors so far is small, but as time goes on it is hoped that it will increase.

With this short introduction the Editors place the CANADIAN LAW TIMES in the hands of the Profession, asking simply that they will be lenient in criticism; and trusting that they will find it worthy of support.

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THE

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THE LAW OF ALLEGIANCE IN CANADA.

THE nationality, or in other words the *status*, of an individual as subject or citizen in relation to a particular sovereignty or nation, is either natural or acquired. Natural, when it results from locality of birth or from parentage; acquired, when an individual becomes by consent, or by the conquest or cession of territory, a subject or citizen of the sovereignty or nation to which he did not originally belong.

This nationality implies a duty which every subject or citizen owes to the sovereignty or nation to which he belongs; and this duty is termed "natural allegiance," or the loyalty and service due from him to such sovereignty or nation. Another, and a minor allegiance, called "local allegiance," is due from those who are neither subjects nor citizens,—strangers-born or aliens—who may be within the territory, and under the protection of a sovereignty or nation; and which local allegiance ceases the instant such strangers-born, or aliens, transfer themselves to their own or another sovereignty.

Natural and local allegiance are to be rendered to a Sovereign or Civil Government *de facto*; for the constitutional maxim is, that possession of the Crown, or Government, gives a sufficient title, or claim, to the subject's or citizen's allegiance, and justifies his resistance of those who may pretend to a better right (*a*).

(*a*) The statute of the 11th Henry VII, c. 1 was intended, as far as the law could, to place the civil duty of allegiance on a just and reasonable foundation, and indirectly to cut away the distinction between governments *de jure* and *de facto*. It enacted, after reciting that subjects, by

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The old doctrine of allegiance—the tie or *ligamen* which bound the subject to the King in return for the protection which the King afforded the subject—traced many of its rules from the feudal law. It was based upon the assumption that allegiance was a debt of gratitude, and was a perpetual obligation which could not be forfeited, cancelled or altered by any change of time, place or circumstance, even the cession by the Crown of the territories where the subject resided; nor by anything but the united concurrence of the legislature (*b*).

The more modern doctrine is that this indefeasable allegiance is not consistent with the maxim that "governments are instituted for the benefit of the governed," but that allegiance arises from membership of the society, or body politic, which constitutes the nation; and that those who comprise the body politic are bound to be loyal and true to the public authority which executes the civil government of the nation (*c*). And that being so constituted a nation, they have authority to determine upon what terms and conditions those who are alien to their society, or body politic, shall be admitted members thereof and be politically enfranchised.

Inseparately connected with this discussion is the question of a "double nationality." An individual may be born of British parents in a foreign country. By the law of England he becomes a British subject; and by the law of the foreign country he becomes a subject of the foreign country of his birth. He thus has imposed on

reason of their allegiance, are bound to serve their prince for the time being, against every rebellion and power raised against him, that "no person attending upon the King and sovereign lord of this land for the time being, and doing him true and faithful service, shall be convicted of high treason by Act of Parliament, or other process of law, nor suffer any forfeiture or punishment; but that every Act made contrary to this statute should be void and of no effect."—Hallam's *Constitutional History of England*, 23. The King (Henry VII) procured a law to be passed, declaring that no one should be called in question for obeying a King *de facto*.—Earl Russell's *English Government and Constitution*, 14.

(*b*) 2 P. Wms. 123; 1 Blackstone's Com. 456.

(*c*) The highest public authority to be executed by any civil government is the authority of the nation, because it is composed of the largest association of individuals for the purposes of civil government; and the public authority consists of the authority of all over each.—Tiffany's *Government and Constitutional Law* 46.

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him the inconvenience of a double nationality. He may emigrate and become naturalized in another country, foreign to Great Britain and to the country of his birth, and he thus acquires a triple nationality. Again, the country in which he obtains his naturalization may, by conquest or cession, become the territory of another nation, and thus he may be clothed with a fourth nationality; or practically a third, without his consent.

This double nationality, or double allegiance, is not of modern origin; and is thus referred to in Hale's *Pleas of the Crown*:—

"There seems to be a double kind of leige fealty, as where there is a prince that is subordinate to another, and yet hath *jura summi imperii* over his subjects; such was the King of Scots whilst, in some time of Edward I. and Edward III., he was in subjection to the Crown of England; such was the Prince of Wales before the conquest of Wales by Edward I.

"It appears by Bracton (Lib. V., c. 24) that there were very many who had been anciently *ad fidem regis Anglæ et Franciæ*, especially before the loss of Normandy; such were the *comes marescallus*, who were *ad fidem utriusque regis*, but they ever ordered their homages and fealties so that they swore, or professed, ligeance or liege homage only to one, and the homage they performed to the other was rather feudal."

The author then relates the case of Peter Brian, who was Earl of Richmond in England, and Duke of Britany in France. He came into England and swore fealty to the Crown of England, but afterwards fell in again with the King of France and betrayed the army of England. "He lost himself and both Crowns; for the King of France disposed of the Duchy of Britany to his son, and the King of England gave the Earldom of Richmond to Peter de Sabandia." Sir Matthew Hale adds:—"These difficulties befel those that were *ad fidem utriusque regis*; they were sure to be losers on one side, and sometimes on both sides (*d*)."

(*d*) Hale's *Pleas of the Crown* 70.

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The argument against this double nationality, and in support of the modern doctrine of allegiance, is based on the theory of natural freedom. Naturally, every one has the right, and is at liberty, to visit all parts of the earth, as the common heritage of man; and to select such place for his home in any zone which pleases him. He is not responsible to any one for his parentage, or for the place of his birth. Naturally he is at liberty, as soon as he is able to provide for himself, to seek such social and political associations as he finds to be for his good. He can be under no possible obligations to live under the particular form of government under which he chanced to be born. He may seek the highest and best his judgment may determine; and therefore no society or government has any just authority to restrain him of such natural liberty, nor can it impose on him obligations inconsistent with such liberty. He is bound to obey the requirements of the authority under which he lives, and where he chooses to make his home; and if he decides to become an integral member of such society, so that he may claim its fullest protection and enjoy its largest privileges, he is bound to serve it in connection with the other members thereof, if need be, with his property and his life. But if he deems it best for himself to withdraw therefrom, and to seek social and political associations elsewhere, he releases the society and government from all further responsibilities on his account; and he should be freed from all responsibilities to them. By his so releasing them, the basis of his allegiance to the society and government is gone, and the relation between the citizen and them is dissolved and ended (*e*).

To obviate the political inconvenience of double nationality, and to bring the law into harmony with the modern doctrine of allegiance, the Imperial Parliament in 1870, passed the Naturalization Act (33 Vic., chap. 14, amended by 35 and 36 Vic., chap. 39,) which provides:—(1) That aliens should have the capacity of British subjects to hold and inherit real and personal property within the United

(*e*) Tiffany's *Government and Constitutional Law* 211.

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Kingdom. (2) That naturalized aliens might divest themselves of their status as British subjects, and resume their original nationality. (3) That British subjects might renounce their allegiance. (4) That under certain conditions, British-born married women, and children of aliens born in the British dominions, or children of subjects, born out of British dominions, might become aliens, or resume their British nationality. The amending Act of 1872 gives effect to a convention between Great Britain and the United States, and allows the citizens of the United States who had become naturalized as subjects of Great Britain prior to the Act of 1870, to make, prior to the 10th August 1872, a public renunciation of their allegiance; and British subjects naturalized as citizens of the United States prior to the same Act, to make a similar public renunciation of their allegiance; and it preserves to married women who were British subjects prior to their marriage, their rights of property within the British dominions.

It is not clear that the clauses of the Imperial Act relating to expatriation and de-nationalization extend to Canada. Some of the clauses are expressly limited to the United Kingdom; and the 16th section provides that "all laws, statutes and ordinances which may be duly made by the legislature of any British possession for imparting to any person the privileges or any of the privileges of naturalization, to be enjoyed by such person within the limits of such possession, shall, within the limits of such possession, have the authority of law." The Act then repeals certain Imperial Acts which were introduced into Upper Canada, now Ontario, in 1792 by the 32 Geo. III., c. 1, which brought in the English law relating to property and civil rights (*f*); but it may well be doubted whether the repeal of such Imperial Acts would have any validity in Ontario. The legislation of 1792 in effect re-enacted them, and so made them laws of Upper Canada by incorporating them into the Upper Canada Act, 32 Geo. III., c. 1.

(*f*) That from and after the passing of this Act (15th October 1792) in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as the rule for the decision of the same.

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But there are stronger grounds upon which it may be questioned whether the Imperial Naturalization Act of 1870 applies to Canada. It uses terms from which might be inferred that some of its provisions were intended to apply to the colonies. But Lord Chancellor Hatherley, when moving the second reading of the Bill in the House of Lords—referring to the second clause which allows aliens to hold real and personal property within the United Kingdom—said: "The clause contains a proviso that it shall not confer any right to hold property situated out of the United Kingdom, for we cannot govern," [*quære*, legislate for] "the Colonies having legislatures of their own" (*g*).

This opinion of the Lord Chancellor is quasi judicial, and is therefore important on this question. In the case of *Regina* v. *Bishop of Oxford*, (L. R. 4 Q. B. D. 525), the Lord Justices (Thesiger, L. J., *dubitante*,) allowed the opinion of Lord Chancellor Cairns on the construction of a clause of a Bill expressed in a speech delivered by him in the House of Lords, to be read by counsel for the purposes of the interpretation of the Act as passed. Lord Justice Bramwell said: "To reject the opinion of the head of the law given to advise the highest court of judicature in the country, sitting indeed in its legislative capacity, and at the same time admit the *obiter dictum* of a judge at *nisi prius*, either in our own or an American Court, seems somewhat strange; more especially as it is certain that if it ought to be excluded, any judge knowing of it and excluding it, would, as soon as he left the court, consult the *Hansard* he had before rejected."

But, without pursuing this argument further, it is obvious that this discussion involves the larger question: whether colonies, possessing Parliamentary Governments are subject to what is termed the "paramount authority of the Imperial Parliament" in matters of legislation; or in other words whether by the grant of Parliamentary Government to the Colonies, the Imperial Parliament has divested itself of legislative authority, *quoad* the classes of subjects respecting which

(*g*) 199 Hansard's Debates 3rd S. 1126.

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the Colonial legislatures are empowered to make laws. Over a conquered territory, the Crown has a prerogative power of legislation; and can, without the assistance of Parliament, make laws for, and levy taxes upon, the newly acquired subjects of the Crown in such territory. But when the Crown creates a local legislature within such territory, and vests in it the power of making laws and levying taxes, the Crown's prerogative legislative power thereupon ceases within the territorial limits of such local legislature (*h*). The power to make laws for the inhabitants of a territory acquired by settlement, belongs to the Imperial Parliament, and not to the Crown alone; but such powers may, by an Imperial statute, be vested in a local legislature. Both Imperial powers can thus legislate for the territories which become colonies of the Empire. In the one case, the Crown without Parliament, and in the other, Parliament, with the assent of the Crown. If then the power of legislation is divested by the establishment of Parliamentary Government in the case of the Crown grant; on what logical constitutional ground can it be argued that it is retained in the case of the Parliamentary grant? And if so retained, then to what extent? As yet, no Judge, and no writer on the constitutional relations of the Colonies to the Empire, has placed any limit to—but on the contrary they have conceded—the legislative authority of the Imperial Parliament over the Colonies, whether possessing Parliamentary governments or not. If then the Imperial legislative authority over the Colonies is unlimited, the Imperial Parliament may pass laws depriving the Colonies of their Parliamentary Constitutions, and abrogating all their local and municipal laws. Such an exercise of Imperial legislative power would be revolutionary; and whatever is revo-

(*h*) "We therefore think that by the two Proclamations and the Commission of Governor Melville [calling an Assembly to enact laws] the King had immediately and *irrevocably* granted to all who were or should become, inhabitants, or who had, or should acquire, property in the island of Grenada, or more generally *to all whom it may concern*, that the subordinate legislation over the island should be exercised by an Assembly with the consent of the Governor and Council." Per Lord Mansfield, C. J. *Campbell* v *Hall*, Cowper, 213.

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lutionary is unconstitutional (*i*). But this question of the extent of the limitations of Imperial legislative control over Colonies possessing Parliamentary governments, must be deferred for future discussion.

It may be proper now to refer to the history and operation of the law of allegiance in Canada; composed as Canada is, of both a conquered and a settled territory. In the 36th article of the capitulation of Canada, between Major-General Amherst and the Marquis de Vaudreuil, it was proposed by the Marquis: "If by the Treaty of Peace, Canada remains to his Britannic Majesty, all the French, Canadians, Acadians, merchants, and other persons who choose to retire to France, shall have leave so to do from the British General who shall procure them passage. And nevertheless, if from this time to that decision, any French or Canadian merchants, or other persons shall desire to go to France, they shall likewise have leave from the British General. Both the one and the other shall take with them their families, servants and baggage." To this the British General replied: "Granted." But, as to those who should remain in Canada after the capitulation, the Marquis proposed: "The French, Canadians, and Acadians, of what state and condition soever, who shall remain in the colony, shall not be forced to take arms against His Most Christian Majesty, or his allies, directly or indirectly, on any occasion

(*i*) Sir Edward Coke says "In many cases the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void. For when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law controls it, and adjudges such Act to be void." *Bonham's case* 8 Co. Rep. 118. See also Lord Holt's observations in 12 Mod. 687; Dwarris *on Statutes* 480; Sedgwick's *Constitutional Law* 125-132.

Lord Brougham's view is the modern one: "We speak with perfect correctness of a law which is proposed, being unconstitutional, if it sins against the genius and spirit of our free Government, as for example against the separation of the executive from the legislative and judicial functions." He illustrates this in the cases of Acts being passed which would permanently prohibit public meetings; withdraw the military wholly from the jurisdiction of the courts of law; or allow the people to choose their judges, and the Crown to name the juries in all civil and criminal cases; all of which he says would be as valid and binding as the Great Charter, or the Act of Settlement; but more unconstitutional laws or laws which would more grievously violate the whole spirit of the constitution, could not well be devised.—Lord Brougham's *Political Philosophy* v.3 320.

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whatsoever; the British Government shall only require of them an exact neutrality. The answer of the British Commander was brief: "They become subjects of the King."

The Articles of Capitulation further refer to the Canadian or French inhabitants of Canada, then about to be transferred to the Sovereignty of Great Britain, as "those settled or trading in the whole extent of the colony of Canada," "those now in Canada, on the frontier of the colony, on the side of Acadia, Detroit, Michilimackinac, and other places and posts in the countries above," "the inhabitants and merchants in the countries above, and in the interior of the colony" (*j*).

By the Treaty of Paris of 1763 which followed this capitulation, the King of France ceded and guaranteed to His Britannic Majesty, in full right, Canada and all its dependencies, with the sovereignty, property, possession, and all other rights which the Crown of France then had over the said countries "and their inhabitants." The conquest and the treaty operated as a virtual naturalization of the French inhabitants of Canada, and made them, as General Amherst stated to the Marquis de Vaudreuil, "subjects of the King."

General Amherst proved himself to be a better Crown Lawyer than the Attorney-General of England, Sir Fletcher Norton; for in 1764, the question was referred to the Attorney-General, whether the French inhabitants of Canada who had been born out of the allegiance of His Majesty, but who remained in the colony under the stipulations of the treaty of 1763, were, or were not, under the legal incapacities and disabilities of aliens. Sir Fletcher Norton replied, that he considered that those subjects of the Crown of France, who were inhabitants of Canada, and who continued there under the stipulations of the treaty, having entitled

(*j*) In the discussions relative to the North Western boundary of Ontario, it became important to ascertain the localities in which the French had posts and settlements prior to the treaty, in order to determine what was included in the King's Proclamation of 1791 giving to Upper Canada—all the territory to the westward and southward of the Ottawa to the utmost extent of the country commonly called or known by the name of Canada.

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themselves to the benefits thereof *by taking the oaths of allegiance*, etc., were not to be considered in the light of aliens, as incapable of enjoying or acquiring real property there, or transmitting it to others for their own benefit; but he recommended that a Naturalization Bill be passed for, among other things, "to quiet such aliens as may have already settled there" (*k*).

The question was, however, set at rest by Lord Mansfield, C. J., in 1774, in the case of *Chapman* v. *Hall* (*l*), who held:—

"1. That a country conquered by the British arms becomes a dominion of the King in the right of his Crown."

"2. That the conquered inhabitants once received under the King's protection become subjects; and are to be universally considered in that light, and not as enemies or aliens."

At the time Canada was ceded to the British Crown, the Imperial laws regulating the naturalization of aliens in the American colonies were:

(1.) 13 George II, c. 7, (1739), which provided that Foreign Protestants, Quakers and Jews, who should reside for seven years in any of His Majesty's colonies in America, and take the oaths of allegiance, etc., before a judge in the colony as required by the Act, should "be deemed, adjudged and taken to be His Majesty's natural born subjects of the Kingdom, to all intents, constructions and purposes as if they and every one of them had been, or were, born within this Kingdom;" and the Secretary of the Colony was required to send over to the Commissioners of Trade and Plantations, lists of all persons naturalized under the Act(*m*). This Act was amended by the 20 George, II., c. 44, (1747) by providing that Foreign Protestants, or Moravians, who scrupled the taking of an oath, might make and subscribe

(*k*) "The Bill in Parliament which he arranged for quieting those doubts was never passed, perhaps never proposed; as wiser men than Norton probably considered such advice as weak."—Forsyth's *Constitutional Law*, 269.

(*l*) Cowper's Reports 204.

(*m*) Repealed by the Naturalization Act (Imp) 1870.

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an affirmation of fidelity and declaration of allegiance, and thereupon should become, and enjoy the privileges of, natural born subjects (*n*).

(2.) 2 George III., c. 3, (1762). This statute enabled Foreign Protestants, enlisted as officers and soldiers, who had served, who should thereafter serve, in the Royal American Regiment, or as Engineers, in America, for two years and who should take and subscribe the oaths, etc., required by the Act, should be deemed and taken to be His Majesty's natural born subjects; and it further provided that any estates, purchased by them in the Colonies, should not be forfeited to the Crown by reason of their having been aliens at the time of the purchase (*o*). An explanatory Act, 13 George III., c. 25, was passed in 1773, declaring that all persons naturalized under the Acts 13 George II., (Foreign Protestants) and 2 George III., (Foreign Officers and Soldiers) should be capable of holding any office or place of trust, civil or military, and of taking grants of land from the Crown, other than offices and lands within the United Kingdom (*p*).

The law of France, in force in Canada at the time of the conquest, regarded as subjects those who were born within French territory, or in the colonies, or even in foreign countries in which the French government had established commercial factories, or at sea, if their parents were French, or in a foreign country, if the father had not his domicile there, nor relinquished his intention of returning to France (*q*). The French law respecting aliens was the *Droit d'Aubaine* (*r*). It allowed foreigners to acquire and hold real and personal property during their lives; but upon their death all their property became confiscated to the Crown (*s*). This law was in force in Upper Canada until

(*n*) Repealed by the Naturalization Act (Imp) 1870.

(*o*) Repealed by the Statute Law Revision Act 30 & 31 Vic. 59 (Imp).

(*p*) Repealed by the Naturalization Act (Imp) 1870.

(*q*) 1 Burge's *Colonial and Foreign Laws*, 698.

(*r*) Foreigners born in neighbouring states were called, in France, *aubaines*, or *alibi nati*.—1 Burge, 701.

(*s*) 1 Burge, 701.

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1792 (*t*), and in Lower Canada until 1831 (*u*), except as to both provinces for the period between the date of General Haldimand's proclamation of 1763 (*v*), which introduced the English law (*w*), and the Quebec Act of 1774 (*x*), which re-introduced the French law, and enacted that in all matters of controversy relative to property and civil rights, resort should be had to the law and customs of Canada as the rule for the decision of the same.

The Provinces of New Brunswick, Nova Scotia, Prince Edward Island, and British Columbia, were acquired by settlement, and not by conquest or cession (*y*). Into these Provinces by settlement, and into Ontario (formerly Upper Canada) by the statutory change from French to English law in 1792, were introduced so much of the English common and statute law as affected the civil status of aliens and their rights of property, as well as the statutes conferring a British nationality on the children and grandchildren of natural-born subjects. By the common law aliens were excluded from holding any public office, and were incapable of taking by descent, or of inheriting real estate, for they were held not to have inheritable blood in them, rather indeed upon a principle of national or civil policy than upon any reasons strictly feudal. By the Law of Parliament, affirmed in a resolution of the House of Commons in 1691, it was declared that no alien, not being denizen, or naturalized, hath any right to vote in elections of members of Parliament (*z*). An alien who obtains Letters Patent giving him the status of a denizen, becomes a subject in regard to his freedom, but he cannot inherit. He cannot vote even though qualified in other

(*t*) U. C. 32, George III. c. 1.

(*u*) L. C. 1, William IV., c. 53.

(*v*) Annual Register, 1763, p. 208.

(*w*) The introduction of English law into a conquered or ceded country does not draw with it that branch of the law which relates to aliens, if the acts of the sovereignty introducing such English law show that it was introduced, not in all its branches, but only *sub modo*.—*Mayor of Lyons* v. *East India Company*. 1 Moore, P. C. 175.

(*x*) Imperial Act 14, George III., c, 83.

(*y*) Forsyth's *Constitutional Law*, 26.

(*z*) *Westminster Election*, 12 Commons' Journal, 367.

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respects at the election of members of Parliament. But no alien, or denizen can be elected a member of Parliament (*a*); nor in England a naturalized subject, unless qualified by Act of Parliament (*b*).

The question how far the French law was in force in Lower Canada, came before the Privy Council in 1835, in the case of *Donegani* v. *Donegani*, when it was held "that since the Act of 14 Geo. III., c. 83, Canadian law, that is, the old French law, including the *Droit d' Aubaine*, has been the law that governed Lower Canada. The cession of Canada to the English, of course, varied the law of alienage in one respect, namely, in respect of the sovereign of the country. When the King of England became King of Canada, the natives of Canada became his subjects. Canada became part of his dominions, subject to be governed by its local laws. By the change of sovereignty, it happened that the law of England, and not the law of France, would of necessity determine the question who were aliens, or not; but when the fact of alienage was established, according to English law, the civil consequences of alienage would be determinable by the local, that is, the Canadian law" (*c*).

A similar view was expressed by Lord Brougham, in the case of the *Mayor of Lyons* v. *East India Company*, thus: "In Canada, the old French law, the *Droit d' Aubaine*, (abolished at the Revolution,) which repudiates the English law of alienage, prevails; and though, at his death the lands of an alien go to the Crown, he can hold them during his life" (*d*).

The judgment of the Privy Council was not received with approval by the Superior Court of Lower Canada. In the case of *Corse* v. *Corse*, Mr. Justice Smith, after quoting the latter part of the judgment said: "We think this wrong. You cannot separate the definition of what an

(*a*) *Lex Parliamentaria*, 182. *John Mitchell's case* (*Tipperary Election*), 3 O'M. & H. 19.

(*b*) *Baron de Ferrieres' case* (*Cheltenham Election*), 3 O'M. & H. 86. The Crown may, however, confer a title of knighthood upon an alien.—Forsyth's *Constitutional Law*, 329.

(*c*) 3 Knapp, P. C. 84.

(*d*) 1 Moore, P. C. 267.

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alien is, from what he can do. As soon as Canada ceased to belong to France, the law of Canada ceased to exist, and the public law of England came in" (*e*).

The presumption of law is that all persons permanently domiciled in the country are subjects of the Crown. "We must presume the resident and assessed inhabitants in this country to be British subjects till something is shewn to the contrary, from which the Court can determine they are aliens. It is not sufficient to swear that certain voters are aliens, without giving particular evidence to show that they *were* aliens, and *how* they were aliens, as by having been born in a certain place named, out of the allegiance of the British Crown" (*f*).

By the common law of England, as well as the French law, all children born within the dominions of the Crown, are natural born subjects. And this *status* attaches to the children of aliens born within such dominions (*g*). Sir Matthew Hale states the argument thus: A, a grandfather, and B, his wife, both aliens, have issue C, a son born here, who hath issue D, a son born here. Nobody can deny that C hath all his natural blood from A and B and no where else; nor is that blood that he hath from them an inheritable blood, yet it is unquestionable that D shall inherit C; and D hath no natural blood, but what he hath from C, nor C no natural blood but what he hath from A and B. But, true it is, the law doth superinduce that civil hereditary quality upon the blood of C by his birth in England, though, as he took it from his father and mother, it was void of that quality. The law of nature made him indeed son; but it was the law of England that gave him a capacity to be an heir in England, or to have one" (*h*). Children born in a country of which their parents are not citizens, and while their parents are temporarily sojourning there, or *in itinere*, are natural born citizens of that country, and may thereby

(*e*) 4 L. C. Jurist, 314.
(*f*) *Regina ex rel Carroll* v. *Beckwith*, 1 Pr. R. 284.
(*g*) *Calvin's case*, 7 Co. Rep. 18.
(*h*) *Colkingwood* v. *Pace*, 1 Ventris, 427.

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become entitled to a double nationality. Whether the foreign parents were in England, *in itinere*, or for occasional business there, their children born during their stay, are natural born subjects. A child born in the United States of an English father is a citizen there, and may inherit there as well as in England; which would be a case of that double allegiance which is effected by the rule of common law, and is not a novelty nor peculiar to that law (*i*). Children born in a ship on the open sea, are considered as born in the territory of the nation to which the ship belongs (*j*). There is no difference between an English ship and the soil of England; an English ship on the high seas may be considered as a floating Island; and persons on board that ship become subject to the laws of England (*k*).

The statutes introduced into the Provinces above mentioned and into Quebec, [formerly Lower Canada] in 1865, (*l*) were (1) 25 Edward III., st. 2, (1350) and 7 Anne, c. 5 (1708) conferring the status of British subjects upon the children of natural born subjects, born out of the dominions of the Crown; as amended by 4 George III. c. 21 (1730) which excluded from the benefit of those statutes the children of those subjects, who, at the time of the children's birth, were traitors, or felons, or engaged in war against the Crown (*m*); and (2) the statute 13 George III. c. 21 (1773) conferring the status of British subjects upon the grand-children of natural born subjects born out of the dominions of the Crown (*n*).

The following cases will illustrate how the first mentioned statutes have been interpreted. The statute *de natis ultra*

(*i*) *Lynch* v. *Clark*, 1 Sandford Ch. (N. Y.), 383.

(*j*) Vattel's *Law of Nations*, s. 216, p. 102.

(*k*) *Forbes* v. *Cochrane*, 2 B. & C. 448; *Regina* v. *Keyn*, 2 Ex. D. 161.

(*l*) The Civil Code of Lower Canada (Quebec), (29 Vic. 45) B. 1 tit. 1 cl. 5 provides: "A person born in any part of the British Empire, even if an alien, is a British subject by right of birth, as also he whose father or grandfather, by the father's side, is a British subject, although he be himself born in a foreign country; saving the exceptions resulting from special laws of the Empire."

(*m*) This was intended to exclude the children of those who adhered to the cause of the Pretender.

(*n*) The Statutes 25 Edward III., st. 2, and 7 Anne, c. 5, were not repealed by the Naturalization Act of 1870.

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mare, declares that the issue born beyond sea of an Englishman upon an English woman shall be a denizen; yet the construction hath been that, though an English merchant marries a foreigner, and hath issue by her born beyond the sea, that issue is a natural born subject (*o*). The son of an Irish Peer, although born in France of a French mother, is a natural born subject (*p*).

Where the children of a person who remained in the United States after the Treaty of 1783, came to Canada in 1792 and 1794, and took the oath of allegiance there under U. C. Act, 9 Geo. IV., chap. 21, the disability was held to have been removed (*q*). Under the Treaty of 1794 between Great Britain and the United States, and the Imperial Act 37 Geo. III., chap. 37, American citizens who held lands in Great Britain on the 28th October 1785, and their heirs and assigns, are at all times to be considered, so far as regards such lands, not as aliens, but as subjects of Great Britain (*r*). In 1792, one Anne Stewart, widow of George Stewart, claimed her *terce* of lands in Scotland. George Stewart and his wife had been born in America before the revolt of the thirteen colonies, and continued to reside there afterwards. It was objected that she had thereby become an alien, and so should be excluded from her claim of *terce*. The Lord Ordinary held that the claimant having been born in America while that country was subject to Great Britain, was not to be considered as an alien but as a subject of Great Britain residing then in a foreign country (*s*).

The cases as to the grandchildren of British subjects are not numerous, and the following will illustrate how the Act has been interpreted:—One A went to the United States after the Treaty of 1783, and became a citizen of, and took the oath of allegiance to, the United States, thereby abjuring his allegiance to the Crown of Great Britain; he held office

(*o*) Per Sir Matthew Hale, C. J., *Collingwood* v. *Pace*, 1 Ventris 427.
(*p*) *Lord Trimelston's case*, 64 Lords' Journal, 93.
(*q*) *Montgomery* v. *Graham*, 31 Q. B. 57.
(*r*) *Sutton* v. *Sutton*, 1 R. & My. 663.
(*s*) *Stewart* v. *Hoome*, 6 Dict. of Decisions, 4649.

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and voted there, married an American woman, and had a son (B) born there, who resided there until his death in 1835, and who left a son (C, grandson of A) also born in the United States. It was held that the grandson was, by virtue of the 13 Geo. III. c. 21, a British subject. The Court held that the privileges conferred by the statute upon the children and grandchildren of the British born subjects, were the privileges of such children and grandchildren, and not of the parent, and were conferred upon them for the benefit of the State (*t*).

The statute conferring the status of British subjects upon such grandchildren was repealed by the Imperial Act of 1870. That repeal could not affect the local statutes of Upper Canada of 1792, and of Lower Canada of 1865 (*u*). But within the other Provinces they were Imperial statutes, and under the 129th section of the B. N. A. Act such Imperial repeal would be operative.

In Ontario, therefore, by force of the Upper Canada Act of 1792, introducing the English law, and in Quebec, by the Civil Code of 1865, the grandchildren of British subjects, born out of the dominions of the Crown, are British subjects within these two Provinces; but by the repeal of the Imperial Act of 1773 which conferred that status, such grandchildren, born after 1870, would be aliens in the United Kingdom and in the other Provinces of Canada.

The Canadian Naturalization Act of 1868, (31 Vic. c., 66) (*v*), provides that aliens who at the time of the passing of that Act (22nd May 1868) were domiciled in Canada; and aliens who should thereafter come into Canada, and who should reside continuously therein for three years (*w*), and who should take and subscribe the oaths of allegiance and residence prescribed by the Act, and cause them to be filed of record in the office of the Clerk of the Peace, and should present to the Court of General Sessions of the Peace, and

(*t*) *Fitch* v. *Weber*, 6 Hare 57, s. c. 12 Jurist 76.

(*u*) Ante p. 5, and p. 15, note (*l*).

(*v*) A summary of the prior Canadian Naturalization Acts will be found in the *Manual on Voters' Lists*, 104.

(*w*) The Imperial Act of 1870 requires 5 years residence.

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cause to be read and filed, a certificate from the Justice of the Peace before whom such oaths were taken, that the applicant had taken the oaths, and had been so resident for three years, and was a person of good character, etc., may, if no valid objection be made to the naturalization of such alien, obtain a certificate of naturalization from the court; and thereupon such alien should become entitled to all the rights and privileges of British birth.

The amending Act of 1871 (34 Vic., c. 22) enacts that aliens who, prior to 1st January 1868, had taken the oaths of allegiance and residence required by the Naturalization Laws, are, by the Act, admitted to the privileges of natural born subjects; and the certificate of the Justice before whom the oaths were taken, or the oath of the party in the form prescribed, shall be evidence of such naturalization. Aliens domiciled on the 1st July 1867, and who were then residents, and who take and subscribe the oath of allegiance and residence as provided in the Act, become entitled to the privileges of British birth. The oaths so taken are to be filed with the Clerk of the Peace, who shall thereupon issue to the party a certificate of naturalization which shall be *prima facie* evidence of naturalization under the Act.

By the British North America Act, the Parliament of Canada has authority to make laws respecting "Naturalization and Aliens;" and each Provincial Legislature has authority to make laws respecting "Property and Civil Rights in the Province." The Dominion Parliament therefore can make an alien a British subject, and confer civil rights on aliens in respect of Dominion offices, and of voting for members of the House of Commons. The Provincial Legislature alone can endow aliens with the right to acquire and hold real and personal estate; and it can confer upon them civil rights respecting Provincial offices (*x*) and of voting, within the Province, at Municipal and Legislative elections, and, as the Dominion election law now stands, may, by so doing, give aliens the right to vote at Parliamentary elec-

(*x*) Forsyth's *Constitutional Law*, 330.

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tions; but neither legislature can legalize the election of an alien as a member of either elective House, or his appointment to the Upper House, or as an adviser of the Crown.

In the United States, Congress alone has power to establish a uniform rule of naturalization. But even there State legislation has to some extent interfered with the Federal power. Each State may still confer the privileges of citizenship within the State upon an alien, or any person or class it thinks proper. But such rights of citizenship are valid only within the limits of the State (*y*), and do not confer the rights and privileges secured to citizens of the United States under the Federal Government. If the States choose to exercise the power to naturalize, as an original one, they must abide by the rule which Congress makes (*z*). Under this construction of the Federal and State powers, no less than twelve of the States permit aliens, after a short residence therein, and after declaring their intention to become citizens, to exercise the elective franchise (*a*). And thus, a State by conferring on aliens the right to vote, thereby gives them an equal voice with every other citizen in the government of the United States (*b*).

The status of a British naturalized subject is not uniform throughout the Empire. Owing to the anomalous, and *quasi* independent, relations of the Colonies to the Empire, their statutory enactments are not of universal application. By the Imperial Naturalization Act of 1870, an alien who obtains a certificate of Naturalization is, *within the United Kingdom*, entitled to all the political and other rights of a natural born British subject *in the United Kingdom*. By the Imperial Act of 1847, 10 & 11 Vic., c. 83, which was repealed, but re-enacted in terms by s. 16 of the

(*y*) *Dred Scott* v. *Sandford*, 19 Howard, U. S. 393.

(*z*) *Ex parte Frank Knowles*, 5 Cal. 300.

(*a*) Cooley's *Principles of Constitutional Law*, 77.

(*b*) *Ex parte Carl Wehlitz*, 16 Wis. 443; *Dred Scott* v. *Sandford*, 19 How. U. S. 393. "It would seem that there might be some question whether a State could confer upon an alien this high privilege."—Cooley's *Principles of Constitutional Law*, 78.

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Act of 1870, Colonial Naturalization Laws are operative only within the respective limits of the colonies enacting them; so that an individual may be a naturalized British subject within the United Kingdom, and an alien in the colonies; and a naturalized British subject in one colony may be an alien in the United Kingdom, and in the other British Colonies, according to the locality of his naturalization. In 1863, a circular was issued from the Foreign Office by Lord John Russell, to the effect that the rights conferred by colonial naturalization must be held to be limited to the precincts of the colony. But, in 1865, the opinion of the law officers of the Crown was taken on the subject, and, according to their view a foreigner duly naturalized in a British colony is entitled, as a subject of the Crown in that colony, to the protection of the British Government in every other State, but that in which he was born, and to which he owes a natural allegiance (*c*).

Analogies may be found for the anomalies of Colonial and Imperial Naturalization, in the anomalies of the State and Federal jurisdictions respecting the naturalization of aliens; but with this marked difference that in the case of the former, the colonies have no representative voice in the Imperial Parliament; while in the case of the latter, both citizens and the State have full representation in the Federal Congress. Other anomalies will appear from the references made in this paper, all of which show that the question is one which needs legislative consideration; but, perhaps one question more important to Canada than the details of a uniform system of British naturalization, is the one suggested by the statement of a Lord Chancellor of England, that there are some limitations to Imperial Parliamentary control over "Colonies having Legislatures of their own" (*d*).

THOMAS HODGINS.

(*c*) Chief Justice Cockburn *On Nationality*, 37.
(*d*) Ante p. 6.

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DOES A POWER TO SELL IMPLY A POWER TO MORTGAGE?

An answer to this question can be found in almost any one of the many books upon Powers, Mortgages or Trusts; but upon examining the answers they will be found as various and conflicting as are the judicial decisions and *dicta* upon which they purport to be founded.

The strongest advocates for a liberal construction of the power are to be found among the older text writers, who answer the question generally in the affirmative, on the ground that a mortgage is a conditional sale. The proposition is thus stated in *Coote* on Mortgages (*a*): "Estates are sometimes vested in trustees upon trust for sale, without any express power to mortgage. A mortgage is a partial sale, and therefore a trust for sale will, generally speaking, include a mortgage; and it must depend upon the nature of the trust if it be not authorised by it. If the object of the trust is for a definite purpose, such as to raise a certain sum of money for debts, portions or the like, without an ulterior intention of effecting an entire conversion into personalty by an absolute sale, there seems no objection to the money being in every case where practicable, raised by mortgage." It is then pointed out that it would be otherwise, where there is an apparent intention to effect a complete conversion, but the idea is suggested throughout, that the presumption is in favour of the power to mortgage which exists unless there is a clearly expressed intention to the contrary in the instrument creating the trust. This is substantially the position taken in *Hill* on Trustees, 487; while the same view in favour of the power is still more strongly expressed in 1 *Powell* on Mortgages, (Ed. by *Coventry* and *Rande*) 162, which authority is quoted with approval in 4 *Kent's* Commentaries, (11th ed.) 161.

The chief authority relied upon by all these writers is a *dictum* of Lord Macclesfield in *Mills* v. *Banks* (*b*), of which

(*a*) 3rd Ed., p. 157. (*b*) 3 P. W. 9.

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we shall speak more fully hereafter. In the early editions of *Sugden* on Powers, the same proposition is stated with a *semble;* but in the later editions the generality of the rule is restricted by so many modifying clauses, as to make it almost cease to be a rule (*c*). Mr. *Chance* disapproves of even the small concessions made by the last-mentioned writer in favour of the power (*d*); and Mr. *Lewin* still more plainly gives his opinion that "a trust for sale, if there be nothing to negative the settlor's intention to convert the estate absolutely, will not authorise the trustees to mortgage" (*e*). The general effect of the opinions of the lastly mentioned text writers is, that the presumption is against the power, and the *onus* of proof is thrown upon those who uphold it. It may be of some interest to examine the authorities upon which these opinions are founded, together with such other authorities, both English and American, as may throw light upon the question.

The first reported case in which the question is touched upon, is that of *Mills* v. *Banks*, already referred to; and it is curious to note that although this is the case chiefly relied upon by those who maintain the power, yet the question did not there directly arise for decision. The trust there was of a term of years to raise a certain specified sum for portions, by rents, issues and profits. Lord Cowper decreed that the moneys be raised by a *sale* of the trust term. Instead of literally complying with the decree, the trustees mortgaged the term, and obtained the money out of a fund belonging to infants, who were parties to another suit in chancery, and on whose behalf the mortgage was approved by a master of that court. After a lapse of eighteen years, the cause came on for rehearing in 1724, when it was attempted to impeach the said mortgage as not authorized by the trust, or by the decree. Lord Macclesfield held that, as it was discretionary with the court whether they would allow a rehearing or not, so also it

(*c*) See *Sugden* on Powers, 8th Ed., 425.
(*d*) See *Chance* on Powers, 388.
(*e*) *Lewin* on Trusts, 5th Ed., 315.

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was discretionary with them, whether they would give effect to a rehearing that had been allowed; and in the exercise of this discretion, he refused to vary the decree, and gave as his reason for thus exercising his discretion, that the court never gives any aid against a purchaser or mortgagee without notice; this is a stronger case, for, though here there is notice of a settlement, here is also notice that the court has declared and decreed, that the term thereby raised and the trust declared concerning the same, empower the trustees to sell the premises," * * * "*and a power to sell implies a power to mortgage which is a conditional sale.*" The parties were left to file a bill to impeach the mortgage; but there was no final decision in the case, as it is pointed out in a note to the report that the parties came to an amicable settlement. Even had there been a final decision it would not, as Mr. Chance points out, have been a binding authority in favor of the power, for the very trust to raise the portion from rents and profits, would, under the authorities which support Lord Cowper's decree for *sale*, have equally authorized a decree to raise the money by mortgage (*f*).

We next find the point touched upon in a case decided in 1839 (*g*), where Lord Chancellor Cottenham expressly approves of the above *dictum* in *Mills* v. *Banks*; while two months later in the same year, the same question which had arisen before Lord Langdale, M.R., was decided adversely to the power (*h*). In the lastly mentioned case, the trust was to "make sale and dispose of" real and personal property, and to apply the moneys "to arise and be produced from the sale and sales of his said real estates, and by and from the rents, issues and profits thereof respectively, *in the meantime, and until such sale and sales should be respectively made and perfected*," 1st, to pay debts; 2ndly, to raise portions, and as to all the residue "of all the moneys to arise, be produced and got in as

(*f*) *Baines* v. *Dixon*, 1 Ves. Sr. 42; *Green* v. *Belcher*, 1 Atk. 505; *Shrewsbury* v. *Shrewsbury*, 1 Ves. Jr. 234.

(*g*) *Ball* v. *Harris*, 4 Myl. & C. 267.

(*h*) *Haldenby* v. *Spofforth*, 1 Beav. 390.

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aforesaid," to divide between testator's sons. It was held, chiefly by reason of the effect of the words which have been italicised, that there was a clearly expressed intention that there should be a sale out and out, and that a mortgage was therefore not authorized. In this case may be found the germ of the idea running through the modern authorities that the courts will not bind themselves by any hard and fast rule upon the subject, but will in each case endeavour to find out the real intention of the author of the power, and will construe the power accordingly. It has been remarked in one case (*i*) "the principal may make his own vocabulary. He may say, "I authorize a sale, by which word I intend a mortgage," and that intention may be collected by implication from the combined effect of the various provisions of the instrument creating the power. In the same year again we find a third case (*j*) in which Sir Launcelot Shadwell gave construction to an Act of Parliament, on the ground that a mortgage is at law a conditional sale. A doubt had been expressed at the bar, whether the Court of Chancery could, under 2 Geo. IV., cap. 36, and 1 Wm. IV., cap. 47, sec. 2, direct infant devisees to join in conveying their estate *to a mortgagee*, to raise money for the purpose of paying debts as the Act does not in express terms authorize the court to direct infants to convey their estates, except where they are decreed *to be sold* for satisfaction of debts. It was held that the courts had power to so direct. Although this case appears to be pretty closely in point, it might be found to be an unsafe guide in the construction of a private instrument, as it is within the bounds of possibility that a self-asserting court with an aggressive policy might give a more liberal construction to a set of words conferring jurisdiction upon itself, than it would give to the same set of words when granting a power to an individual. It is but fair, however, to point out that the same learned judge

(*i*) *Bloomer* v. *Waldron*, 3 Hill. (N. Y.) 367.
(*j*) *Holmes* v. *Williams*, 8 Simons 557.
(*k*) *The Earl of Oxford* v. *The Earl of Albemarle*, 17 L. J. Eq. N. S. 396.

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did subsequently, in 1848, give an equally liberal reading in favor of a private power.

The next case which we have to note is that of *Stroughill* v. *Anstey* (*l*), which is now looked upon as the most weighty authority upon the question. It was decided in 1852, by no less learned a judge than Lord St. Leonards. The devise in that case was to executors, in trust, at such time or times as to them should seem meet, to sell and convert into money and invest the produce in securities to be held in trust for payment of debts and legacies. It was held that the power did not authorize a mortgage, as it was evident from the terms of the trust that an actual conversion was intended by the testator. The learned judge, after discussing the general question, gives his opinion as follows :—"Generally speaking, a power of sale out and out *for a purpose or with an object beyond the raising of a particular charge*, does not authorize a mortgage; but when it is for raising a particular charge, and the estate itself is settled or devised *subject to the charge*, it may be proper under the circumstances to raise the money by mortgage, and the court will support the mortgage as a conditional sale, as something within the power and as a proper mode of raising the money." It is then pointed out that *Ball* v. *Harris*, already cited, was well decided, because there the testator directed his debts to be paid, and then went on to deal with the *rest and residue of his estate*, thereby charging his debts upon his estate by implication (*m*).

It would appear that in all cases the trustee with a power of sale must have a *legal estate*, in order to justify him in making a mortgage; and that *the legal estate must be conveyed to the mortgagee* when in the eye of a court of law the mortgage will be within the power, as it is in law a conditional sale (*n*). This may have been one of the unexpressed reasons for the decision in *Stroughill* v. *Anstey*,

(*l*) 1 De G., M. & G. 635.

(*m*) See R. S. O., cap. 107, sec. 17, giving power to devisees in trust to sell or mortgage real estate, where it is devised to them subject to a charge of debts, or of a legacy, or other specific sum of money.

(*n*) *Stroughill* v. *Anstey*, 1 De G., M. & G. 645.

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for in that case the mortgage was an equitable one made by deposit of title deeds, and no estate was vested in the mortgagee. Following this case, come *Page* v. *Cooper* (*o*), decided by Sir John Romilly, M.R., in 1853, and *Devaynes* v. *Robinson* (*p*), decided by the same judge in 1857, since which time no English trustee or mortgagee appears to have had sufficient temerity to test the question. In each of these cases the ground of decision is, that, in the opinion of the learned judge, it was the intention of the author of the trust that there should be a conversion out and out. In the first case, it might well have been decided upon the ground that the trust was to sell and raise certain charges, *and invest the residue*, and it can scarcely be supposed that it was intended that moneys for investment should be raised by way of mortgage.

(*o*) 16 Beav. 396. (*p*) 24 Beav. 86.

[*To be concluded.*]

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EDITORIAL REVIEW.

Chief Justice Cockburn.

We regret that, in our first number, we have to chronicle the death of one, who has left behind him a brilliant name and a noble one in the history of Jurisprudence—Sir Alexander James Edmund Cockburn, Lord Chief Justice of England.

He was of Scotch descent, and the tenth baronet, having succeeded to the title in 1858. With his death the title becomes extinct.

He was born on the 24th December 1802, and was consequently nearly seventy-nine years of age when he died. He was called to the Bar on the 6th February 1829, and joined the Western Circuit. In 1841, twelve years after his call to the Bar, having already an extensive practice, he "took silk," and from this time forth his reputation increased rapidly. He was made Solicitor-General in 1850 by Lord John Russell, and received the honour of Knighthood. One year afterwards he became Attorney-General, which office he held till 1852. On the 2nd November 1856, he was appointed Chief Justice of the Common Pleas, upon the death of Sir John Jervis; and on the 24th June 1859, he became Lord Chief Justice of England, of which title it is said he was very fond. His name will be recollected in connection with the Geneva Award, in 1871, which he refused to sign though counselling submission to the decision of the tribunal.

Few men have bequeathed to Bench and Bar such an amount of intellectual riches as he has. His name has been associated with many of the celebrated trials in England, both as a Judge and as an Advocate; and of his whole professional career, it may be said that it was marked by an extremely high degree of honour. He was never known to stoop in order to succeed where he could not accomplish the same ends by honourable means. He was distinguished at the Bar for his brilliant oratory and genius, having laid the foundations at his college, where

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his speeches in debate were marked by their well-chosen language and their evident careful preparation. It has been said of him that his advocacy was to a certain degree carried with him to the Bench, and that his charges to juries exhibited hastily formed and vigorously expressed opinions of the evidence, and evinced a disposition to attack and break down the evidence of witnesses whose stories appeared doubtful to him. Be that as it may, his charges were clear, brilliant, full of genius, culture and eloquence. Several of them have been printed.

He was an unrelenting foe to technicalities, and made them always subservient to abstract principles of justice. He was strongly Conservative in his views as to the constitution of the Courts, and was opposed to the sweeping changes recently made in them. Though still retaining some more deeply learned lawyers,the Bench in England has lost its most eminent man.

Changes on the English Bench.

Chief Justice Coleridge succeeds the late Sir Alexander Cockburn as Lord Chief Justice of England. And while changes are taking place upon the Bench, there is discussed the desirability of abolishing all distinctions between the Judges, saving the office of Chief Justice of England. We learn from English Law Periodicals that a letter was written by the Lord Chancellor to the late Chief Justice of England, suggesting a council of Judges to discuss and report upon the abolition of the Divisional Courts as divisions, and their complete fusion into one Court, both in fact and in name. There being no Divisional Courts, the necessity for Chief Justices or Presidents would no longer exist, and in case the suggestion were carried into effect there would consequently be but one Chief Justice. We will refer more fully to this in our notice of our own Judicature Bill.

Trial of the Biddulph Prisoners.

A commission extraordinary has been issued by the Ontario Government, addressed to the Chief Justices and Judges of the Courts of Queen's Bench and Common Pleas,

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for the holding of a special Court of Oyer and Terminer and Gaol delivery in the County of Middlesex, for the trial of the Biddulph Prisoners. On account of a doubt that exists upon the construction of the B. N. A. Act, as to which Government should issue the commission, another one identical with the Ontario commission will be issued at Ottawa. The trial is to take place on the 24th January. We understand that two Judges will sit.

The coming Election of Benchers.

The term of office of the present Elective Benchers of the Law Society of Upper Canada expires in April next, when the election of new members will take place; and we would remind the Profession that the Act disqualifies from voting any gentlemen whose fees to the Law Society are unpaid. We understand that at the last election of Benchers a number of voters were disqualified on that ground. We shall have occasion to refer more fully to the subject of the Election hereafter.

The Chief Justice of Ontario.

The latest news from France concerning the health of the Chief Justice of Ontario is re-assuring. We are glad to hear that his late temporary indisposition was occasioned by a slight cold, and was not due to his original malady, from which no danger is now apprehended. We are sure that we have the whole profession with us, in wishing him great benefits from his sojourn in the South of France, and a speedy return to health.

Judicature Bill.

A copy of the proposed Judicature Bill came to our hands just as we were going to press. We shall reserve any remarks upon it until our next issue.

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DIGEST OF SELECTED CASES.

ON

CRIMINAL LAW.

ABORTION.

Administering "Noxious Thing."—The prisoner, with intent to procure abortion, supplied a pregnant woman with two bottles full of Sir James Clarke's Female Pills, with directions to take twenty-five at a dose, and that it would have that effect. The pills contained oil of savin, an article used to procure abortion, and it was said that a bottle full would contain about four grains; but the evidence was not very clear as to this It was in evidence that such a quantity would be greatly irritating to a pregnant woman, and might possibly procure an abortion, and that oil of savin in any dose would be most dangerous to give to a woman in that condition. *Held*, under the circumstances, that there was the supplying of a "noxious thing" within the meaning of the Act 32-33 Vic., cap. 20, sec. 60 D, with the intent to procure an abortion. *Reg.* v. *Stitt*, 30 C. P. 30. It is necessary to prove that the thing supplied is noxious; if innoxious, with whatever intent supplied, there cannot be a conviction. *Reg.* v. *Isaacs*, L. & C. 220, 9 Jur. N. S. 212.

The prisoner was convicted under 24 and 25 Vict., cap. 100, sec. 58 [32-33 Vict., cap. 20, sec. 59 Canada] of having feloniously and unlawfully caused to be taken by E. V. a certain "noxious thing," to wit, half an ounce of oil of juniper, with intent to procure her miscarriage.

It was proved that quantities of oil of juniper, considerably less than half an ounce, are commonly taken medicinally, without any bad effect; but that a half ounce produces ill effects, and is, to a pregnant woman, dangerous. *Held*, that the half once of oil of juniper was a "noxious thing," within the Statute. *Reg.* v. *Cramp*, 5 Q. B. D. 307.

Attempt to Procure.—The crime of attempting to produce the miscarriage of a pregnant woman is complete, if the attempt is made any time during pregnancy. *State* v. *Fitzgerald*, 49 Iowa 260.

An acquittal, on an indictment for the murder of an unborn child, by the use of measures intended to produce a miscarriage, is not a bar to a subsequent indictment for an attempt to produce such miscarriage, by the use of the same, or other means. *State* v. *Elder*, 65 Ind. 282.

ACCESSORIES AND ACCOMPLICES.

General Principles.—The jury are the exclusive judges of the credibility of accomplices, as well as of other witnesses in the case. *People* v. *Gibson*, 4 Pac., C. L. J. 108.

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A conviction, founded upon the testimony of an accomplice alone, will stand, if such testimony is deemed sufficiently satisfactory by the jury. They should, however, carefully scrutinize such testimony. *Johnson* v. *State*, 65 Ind. 269.

Where the testimony of an accomplice is relied upon, the prosecution may introduce evidence tending to corroborate him, even though he has not been impeached. *Mosher* v. *People*, 9 N. Y. *Weekly Digest*, 347.

A detective who, for the purpose of discovering crime, ostensibly aids in its commission is not an accomplice within the meaning of the provision of the Code, which prohibits a conviction on the uncorroborated testimony of an accomplice. *Wright* v. *State*, 7 Tex. App. 574.

The fact that an accomplice is introduced as a witness, and testifies to such facts as are within his knowledge, withholding nothing because of its tendency to self-crimination, does not constitute a legal defence to a prosecution against him, though he may thereby have an equitable claim to Executive clemency. *State* v. *Lyon*, 81 N. C. 600.

Two men, having quarrelled, agreed to fight with their fists; and to bind themselves to fight, each put down £1, so that £2 might be paid to the winner. The prisoner consented to hold the £2 and pay it over to the winner. Otherwise he had nothing to do with the fight and he was not present at it. There was no reason to suppose that the life of either man would be endangered. The men fought and one of them received injuries of which he afterwards died. The prisoner, having been informed who was the winner, but not knowing of the other man's danger, paid over the £2 to the winner. *Held*, that the prisoner was not an accessory before the fact to the manslaughter of the man killed. *Reg.* v. *Taylor*, L. R. 2, C. C. 147.

An accessory before the fact must be absent at the time when the crime is committed, and the act must be done in consequence of some counsel or procurement of his. *Reg.* v. *Brown*, 14 Cox Crim. Cas. 144.

There can be no accessory or accomplice in the offence of involuntary manslaughter. *Adams* v. *State*, 65 Ind. 565.

All persons, associated together in a criminal enterprise, are to be held equally responsible for any crime committed by either in furtherance of their object. *State* v. *Johnson*, 7 Oregon 210.

Several persons were tried upon one indictment, some as principals in murder, other as accessories after the fact. The principals were convicted of manslaughter. *Held*, that those charged as accessories might rightly be convicted as accessories to manslaughter. *Reg.* v. *Richards*, 2 Q. B. D. 311.

In order to convict of the offence of being an accessory after the fact to a felony, evidence must be given on the part of the prosecution that the accused did some act to shield the principal felon from justice. *Reg.* v. *Brannon*, 68 L. T. 319.

Testimony, tending to show that a defendant, who was indicted as an accessory, furnished money to aid his co-defendant, who had admitted his guilt, to escape, is properly admitted. *State* v. *Hudson*, 50 Iowa 157.

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ALIBI.

Burden of Proof.—The burden of proving an *alibi* is on the defendant offering that defence. *Iowa Sup. Ct., State* v. *Red*, 4 N. W. R. 831.

What Evidence Sufficient.—A defendant, relying upon an *alibi* as a defence, is not bound to prove the same beyond a reasonable doubt; but only by preponderance of evidence. *Iowa Sup. Ct., State* v. *Kline*, 6 N. W. R. 84; *State* v. *Northrup*, 48 Iowa, 583.

Whenever pertinent and material evidence, by which an *alibi* might, if true, have been supported, is withheld, it is a circumstance against the truth of the alleged *alibi*. *Braswell* v. *State*, 3 Leg. Rep. N. S. 283.

When an *alibi* is relied on in defence, its nature and character should be explained to the jury. *Deggs* v. *State*, 7 Tex. App. 359.

ARSON.

What Property within Statutes.—A building used by a carpenter, who was putting up a house near it, as a place of deposit for his tools and window frames which he had made, but in which no work was carried on by him. *Held*, not "a building used in carrying on the trade of a carpenter" within 4 & 5 Vict., Cap. 26, Section 3.—*Regina* v. *Smith*, 14 U.C.R. 546.

An indictment for setting fire to a cock of hay, cannot be sustained under a statute making it an offence to set fire to a stack of hay. *Reg.* v. *McKeever*, 5 Irish R. C. L. 86 [32-33 Vict., Cap. 22, Section 21, Canada.]

Under the Imperial Act, 24 & 25 Vict., Cap. 97, S. 6. [32-33 Vict., Cap. 22, S. 7.] a "building" is not necessarily a finished structure. An unfinished house, of which the walls were built and finished, the roof on and finished, a considerable part of the flooring laid, and the internal walls and ceilings prepared ready for plastering. *Held*, to be a building within the meaning of the section. *Reg.* v. *Manning*, L. R. 1 C. C. 338.

The remains of a wooden dwelling house, after a previous fire, which left only a few rafters of the roof, and injured the sides and floor so as to render it untenantable, and which was being repaired. *Held*, not a building within section 7 of 32-33 Vict., Cap. 22, so as to be the subject of arson. *Reg.* v. *Labadie*, 32 U. C. R. 429.

Averment of property.—Two prisoners were indicted, under the Imperial Act, 24 & 25 Vict., Cap. 97, section 3 [32-33 Vict., Cap. 22, section 3 Canada], for feloniously setting fire to a shop "of and belonging to" one of the prisoners. *Held*, that the averment of property in the prisoner was an immaterial averment, which need not be proved; and that an intent to injure another person, as owner might be proved in support of the indictment. *Reg.* v. *Newboult*, L. R. 1 C. C. 344.

Motive.—When, on the trial of an indictment for maliciously burning a building, it appeared that the defendant had conveyed the building to his sons, subject to a mortgage made by him which they assumed to pay, evidence that defendant suggested to an insurance broker, a month before the fire, that there should be additional insurance on the building, is ad-

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missible to show a motive on his part, to commit the offence. And it is competent for the Government to show, on the question of the intent with which defendent burned the building on the day named in the indictment, that he set fire to the same building three days before. *Commonwealth* v. *Bradford*, 126 Mass. 42.

On a trial for arson it may be shown, for the purpose of connecting the prisoner with the offence of burning the prosecutor's mill, that the prisoner had had previous difficulties with the prosecutor, and, in conjunction with others, had proceeded against the mill as a nuisance, and threatened that someone would burn the mill. *Hudson* v. *State*, 61 Ala. 333.

Intent.—In an indictment for arson, it is unnecessary to charge any intent, as our Statute, (differing from the English Act) does not make the intent part of the crime. *Reg.* v. *Greenwood*, 23 U. C. R. 250.

But although the indictment is sufficient without alleging any intent, an intent to injure or defraud must be shown on the trial. *Reg.* v. *Cronin*, Q. B. H. T. 1875. Not reported.

On the trial of an indictment under a statute for "burning" defendant's own building, with intent to defraud the insurers, it appeared that the building was only partially destroyed, but that the defendant claimed payment from the insurer for the damage done. *Held*, that the building was burned within the meaning of the Statute.—*State* v. *Babcock*, 51 Vt. 570.

On the trial of an indictment for arson, in burning insured property, a witness for the State testified that he and one jointly indicted with the defendant, at the latter's request, and on his promise that the co-defendant could have all the goods he could carry away, set fire to the property. *Held*, that evidence that after the fire, other persons had purchased goods of the kind insured, at the house of the co-defendant, of his wife, was properly admitted. *Johnson* v. *State*, 65 Ind. 204.

ASSAULT.

Definition of.—An assault is an inchoate violence to the person of another, with the present means of carrying the intent into effect. Threats are not sufficient; there must be proof of violence actually offered, and this within such a distance that harm might ensue if the party was not prevented, *People* v. *Lilley*, 1 Crim. L. Mag. 605.

Evidence.—A person charged with assaulting a child of seven years of age, may allege the child's consent as a defence. *Regina* v. *Roadley*, 42 L. T. N. S. 515. [*Reg.* v. *Read*, 1 Den. C. C. 377. *Reg.* v. *Beale*, L. R. 1 C.C. 10.]

To convict of an assault with a dangerous weapon, with intent to do great bodily harm, one—who comes to the assistance of the person holding the weapon, it is not necessary that he should have aided in the previous arming of such person. *State* v. *Herdina*, 25 Minn. 161.

ATTEMPT TO COMMIT CRIME.

The offence of attempting to have carnal knowledge of a girl under the age of ten years, may be committed, notwithstanding the girl consents to the act being done. *Regina* v. *Beale*, L. R. 1 C. C. 10. [*Anschicks* v. *State*, 6 Tex. App. 524]

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BAIL.

When Granted.—Upon a charge of assault, or aggravated assault, there being doubts as to the law, the fact being disputed, the prisoner was admitted to bail, pending application for his discharge, which was to be renewed in term. *In re McKinnon*, 2 L. J. N. S. 324.

In cases of felony the prisoner cannot, as a matter of right, be admitted to bail. Whether he shall be let to bail is a question resting in the sound legal discretion of the Court. *Superior Court, Buffalo, N. Y. People* v. *Shuttuck*, 6 Abb. N. Cases 33.

When Defective.—A recognisance, which does not set forth any offence against the laws of the State, is fatally defective. *Reviere* v. *State*, 3 Tex. L. J. 155.

BIGAMY.

What Constitutes.—The prisoner, having a wife living, was married to another woman in the presence of the registrar, describing himself, not as E. R., his true name; but as B. R. There was no evidence to shew that the second wife knew that his Christian name was misdescribed. *Held*, that the prisoner was guilty of bigamy. *Reg.* v. *Rea*, L. R. 1 C. C. 365.

Where a marriage was alleged to have been solemnized in the State of New York by a Justice of the Peace, who had power to marry, a witness, who was not a lawyer nor an inhabitant of the United States, and who did not state how the authority of the Justice was derived, was incompetent to prove the marriage. *Held* also, that where the prisoner relied upon his first wife's lengthened absence and his ignorance of her being alive, he should shew enquiries made, and that he had reason to believe her dead; more especially when he had deserted her: and this, notwithstanding the fact, that the first wife might have married again. *Reg.* v. *Smith*, 14 U. C. R. 565.

Burden of Proof.—When it is proved that the prisoner and his first wife have lived apart for the seven years preceding the second marriage, it is incumbent on the prosecution to shew that, during that time, he was aware of her existence; and in the absence of such proof, the prisoner is entitled to be acquitted of bigamy, *Reg.* v. *Curgerwen*, L. R. 1 C. C. 1. [See *Hull* v. *State*, 7 Tex. App. 593; and *State* v. *Barrow*, 31 Louisiana Ann. 691.]

Wife when Incompetent.—The first wife is not admissable as a witness to prove that her marriage with the prisoner is invalid. *Reg.* v. *Madden*, 14 U. C. R. 588.

Where a person, already bound by an existing marriage, goes through with another person a form of marriage, known to and recognised by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, such person is guilty of bigamy under the Imperial Act 24 and 25 Vic., cap. 100, sec. 57, [32-33 Vic., cap. 20, sec. 58 Canada] notwithstanding any special circumstances, which, independently of the bigamous character of the marriage, may constitute a legal

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disability in the parties, or make the form of marriage resorted to inapplicable to their case.

The prisoner, having a wife living, went through the ceremony of marriage with another woman, who was within the prohibited degrees of affinity, so that the second marriage, even if not bigamous, would have been void under 5 and 6 Will. 4, cap. 54, sec. 2. *Held*, that the prisoner was guilty of bigamy. (*Reg.* v. *Fanning*, 17 Irish C. L. 289; 10 Cox Cr. Cas. 411, disapproved of;) *Reg.* v. *Allen*, L. R. 1 C. C. 367. [See *People* v. *Baker*, 76 N. Y. 78; *State* v. *Goodrich*, 14 West Virginia 834.]

It is not necessary that marriages should be solemnised in a church where banns have been published, and no dissent then expressed by parents or guardians, the husband being under age, is no objection, even by the English Marriage Act; but *quære*, whether that Act is in force in the Province of Ontario. *Reg.* v. *Secker*, 14 U. C. R. 604.

Divorce.—Two English persons married in England. The husband afterwards went to Kansas, in the United States, and after an interval of a year, presented a petition and obtained a divorce by reason of his wife's desertion. He then married again. The wife had received no notice of the petition. *Held*, that his domicile at the time of the divorce was English; and that therefore the divorce was null and void, and that he had committed bigamy. *Quære*, whether the domicile of the wife is the domicile of the husband, so as to compel her to become subject to the jurisdiction of the tribunals of any country, in which the husband may choose to acquire a domicile. *Briggs* v. *Briggs*, 5 P. D. 163.

A decree of dissolution of marriage, obtained under the English Divorce Act 1857, is for all purposes a complete severance of the matrimonial ties, and enables either party to marry again. *Wilkinson* v. *Gibson*, L. R. 4 Eq. 162.

BURGLARY.

Attempt.—An attempt to commit a burglary may be established, on proof of a breaking with intent to rob the house, although there is no proof of an actual entry. *Reg.* v. *Spanner*, 12 Cox C. C. 155; Bramwell B.

Evidence.—In a trial for burglary; *Held*, that evidence, tending to shew that on the night of the offence, defendant and another slept in a barn; and that the stolen articles were found in close proximity to them, and that when the officers went to arrest them the other party resisted and made his escape, was proper to go to the jury and be commented on by the prosecution. *Cummins* v. *People*, 3 N. W. R., (N. S.) 305.

Extradition.—Burglary is not an offence within the Ashburton Treaty, or the Statutes of Canada, passed to give effect to it. *In re Beebe*, 3 P. R. 273.

CHARACTER.

General.—A person accused of a crime, is in all cases permitted to introduce evidence tending to establish his previous good character, and it

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is for the jury, without instruction from the Court in reference thereto, to determine its weight as they would any other fact or evidence. *State* v. *Northrup*, 48 Iowa 583.

A charge that "if a man is found not guilty his previous good character has nothing to do with the case, but if you have reasonable doubt as to his guilt, then the character steps in and aids in determining that doubt." *Held*, to have been error; evidence of good character is positive evidence and may of itself, by the creation of a reasonable doubt, produce an acquittal. *Pa. Sup. Ct., Heine* v. *Commonwealth*, 8 Rep. 827.

CIRCUMSTANTIAL EVIDENCE.

General.—This kind of evidence is receivable both in civil and criminal cases; and the necessity of admitting it in criminal matters, is even greater than in civil matters; and it is adopted more readily in proportion to the difficulty of proving the fact by direct evidence, and because of the ease with which it can be disproved by the proof of other facts inconsistent with it. But to warrant a conviction it must be entirely satisfactory, and of such significance, consistency and force, as to produce conviction in the minds of the jury of the guilt of the accused, beyond a reasonable doubt. *State* v. *Goldsborough*, 1 Del. Cr. 302.

In a trial for murder, the prosecution proved that footprints were found on the premises where the assassination had been perpetrated, and was further allowed, over objection by the defence, to prove that the examining magistrate compelled the defendant to make his footprints in an ash-heap, and that the footprints so made corresponded with those found on the premises where the homicide was committed. It was objected that the evidence was incompetent, because in violation of the guaranty in the Bill of Rights, that, "one accused of crime shall not be compelled to give evidence against himself." *Held*, on review of the authorities, that the objection was not well taken, nor the evidence within the inhibition of the Bill of Rights. *Walker* v. *State*, 7 Tex. App. 245.

A person who, upon examination on the *voir dire*, declares that he would not convict one accused of murder upon circumstantial evidence, or that he would have scruples in doing so, is not competent to sit as a juror upon a trial for murder. *State* v. *West*, 69 Mo. 401.

COINING,

What Constitutes offence.—The prisoner was tried under the Imperial Statute 24 & 25 Victoria, Chapter 99, section 9 [32-33 Victoria, Chapter 18, section 9 Canada] for uttering and putting off, two false and counterfeit sovereigns, knowing them to be false and counterfeit. The evidence of uttering and guilty knowledge was complete, but a case was reserved, upon the question whether the coins which were uttered could properly be held to be false and counterfeit, within the meaning of the Statute. The coins had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part. The effect of the filing was to reduce the milling entirely or almost entirely. In order to restore the appearance of the coins, a new milling had been made on each of the coins

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with tools. Held by Lord Coleridge, C. J., Pollock and Huddleston, B.B. (Lush and Stephen, J. J. dissenting), that the coins were false and counterfeit within the meaning of the above mentioned Statute. *Reg.* v. *Hermann*, 4 Q. B. D. 284.

CONCEALMENT OF BIRTH.

General Principles.—In order to convict a woman of attempting to conceal the birth of her child, a dead body must be found, and identified as that of the child of which she is alleged to have been delivered. *Reg.* v. *Williams*, 11 Cox, C. C. 684.

Mere proof that a woman was delivered of a child, and allowed two others to take away its body is insufficient to sustain an indictment against her for concealment of its birth. *Reg.* v. *Bate*, 11 Cox C. C. 686.

CONSPIRACY.

General Principles.—Conspiracy is a mixed question of law and fact; a deduction to be drawn from an intimate number of particulars, which the jury alone are competent to make; and where there is a *prima facie* case, it is the duty of the Court to leave it to the jury to say whether the evidence is sufficient in law and in fact to prove the offence charged. So *held* in *Bloomer* v. *State*, 48 Md. 521.

A fraudulent agreement, by a member of a partnership with third persons, wrongfully to deprive his partner, by false entries and by false documents, of all interest in some of the partnership property on taking accounts for the division of the property on the dissolution of the partnership, is a conspiracy, although the offence was completed before the passing of 31 & 32 Vict., Cap. 116, [32-33 Vict., Cap. 21, Section 38, Canada] by which a partner can be criminally convicted for feloniously stealing partnership property. *Reg.* v. *Warburton*, L. R. 1., C. C. 274.

Every one coming into a conspiracy at any stage of the proceedings, with knowlege of its existence, is regarded in the law as a party to all the acts done by any of the other parties before or afterwards, in furtherance of the common design. *United States* v. *Sacia*, 26 Int. Rev. Rec. 140.

CONSTABLE.

General.—The prisoner assaulted a police constable in the execution of his duty. The constable went for assistance, and after an interval of an hour, returned with three other constables, when he found that the prisoner had retired into his house, the door of which was closed and fastened; after another interval of fifteen minutes, the constables forced open the door, entered and arrested the prisoner, who wounded one of them in resisting his apprehension. *Held*, that as there was no danger of any renewal of the original assault, and as the facts of the case did not constitute a fresh pursuit, the arrest was illegal. *Reg.* v. *Marsden*, L. R. 1, C. C. 131.

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DYING DECLARATIONS.

Parol Evidence of.—It is competent to show by parol, what were the dying declarations of the deceased, when such declarations, although reduced to writing, were not read over to, nor signed by the deceased, notwithstanding the absence of the writing is not accounted for. *State* v. *Sullivan*, 51 Iowa 142.

General principles.—In order to render a dying declaration admissible in evidence, it must be made under a settled, hopeless expectation of death; and where the deceased stated that she had no hope "at present" of recovery, it was held that these words rendered the statement then made by her inadmissible. *Reg.* v. *Jenkins*, L. R. 1, C. C. 187.

EMBEZZLEMENT.

General principles.—The Statutory offence of embezzlement originated in a necessity, which resulted from the inapplicability of the common law of larceny, to breaches of trust by persons occupying fiduciary relations. All authorities treat it as akin to larceny, and the Code of the State of Texas affixes the same penalty to it as to that offence [32-33 Vict., Cap. 21, Sections 2 to 9, Canada]. Concisely defined, it is the fraudulent appropriation of another's personal property by one to whom it had been intrusted. *Leonard* v. *State*, 7 Tex. App. 417.

Where a person not engaged in collecting moneys for others as an independent employment, is employed to collect money for another, subject to his direction and control, the relation of principal and agent is thereby created. And in such case the agent may be guilty of embezzlement, although he was to receive for his services a percentage of the moneys collected. When an agent is prosecuted for the embezzlement of his employer's money, in a certain county wherein he had possession of the money, and in which it was his duty to account to his employer upon demand being made, it is no defence to show that he had expended the money for his own use in another county. *Campbell* v. *State*, 35 Ohio, 70. [See *McGregor, et al.* v. *Scarlett*, 7 P. R. 20.]

FALSE PRETENCES.

What Constitutes.—An indictment charged one G. with having obtained £30 from the prosecutor W. on the false pretence that he the said G. then wanted the loan of £30, to enable him to take a public house at M, by means of which said false pretence, the said G. did then unlawfully and fraudulently obtain the said sum from the said W. with intent to defraud: whereas the said G. was not then going to take a house at M. * * * as he the said G. well knew, and whereas the said G. did not then want a loan of £30, or any money, to enable him to take the said house. *Held*, insufficient, being a mere promissory false pretence. *Reg.* v. *Woodman*, 14 Cox C. C. 179 (1879).

C. was convicted of obtaining potatoes from the prosecutor, by falsely pretending that he then was in a large way of business, that he was in a position to do a good trade in potatoes, and that he was able to pay for

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large quantities of potatoes as and when the same might be delivered to him. The evidence that C. had so pretended was the following letter written by him to the prosecutor: "Sir,—Please send me one truck of regents and one truck of rocks as samples at your prices named in your letter; let them be good quality and I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. Yours &c. P.S.—I may say if you will use me well I shall be a good customer. An answer will oblige saying when they are put on." *Held*, affirming the conviction, that the words of the letter were fairly and reasonably capable of a construction supporting the pretence charged, and that it was a question for the jury whether the writer intended the prosecutor to put that construction upon them. *Reg.* v. *Cooper*, 2 Q. B. D. 510.

FORGERY.

What Constitutes.—It is forgery to make a deed fraudulently with a false date, when the date is a material part of the deed, although the deed is in fact made and executed by and between the persons by and between whom it purports to be made and executed. *Reg.* v. *Ritson*, L.R. 1, C.C. 200.

An order for merchandise may be the subject of forgery though addressed to no one. *Tenn. Supreme Ct.*, *Peete* v. *State*, 2 Lea 513.

The mere false making of a note without the intent to defraud some one, does not constitute the crime of forgery. *Ill. Supreme Ct.*, *Fox* v. *People*, 1 N. W. Rep. 702.

INSANITY.

General principles.—A criminal intent is an indispensable constituent of any crime. An insane person is incapable of having such intent; and therefore insanity when properly proven is a complete answer to a criminal charge. To sustain the defence of insanity it must be proven to exist at the time of the commission of the criminal act, or so immediately preceding such act as to justify the presumption that the paroxysm had not entirely passed away at that time. Insanity is not a presumption but a defence, to an admitted crime, which must be conclusively supported by proof; the measure and character is such as is required in civil cases; but in criminal cases a reasonable doubt of sanity raised by all the evidence, does not authorise an acquittal. *Alabama Supreme Ct. Craswell* v. *State*, 1 South. L. J. & R. 711.

In a trial for murder, the Court below instructed the jury to the effect that an act done in a state of insanity is not punishable, and that in such cases the true inquiry is whether or not the accused was capable of having, and did have, a criminal intent, and the capacity to distinguish between right and wrong in respect of the particular act of which he is charged. *Held*, in substantial accord with the adjudications of the State of Texas and other States. *Williams* v. *State*, 7 Tex. App. 163.

LARCENY.

What Constitutes.—The removal from a safe of a drawer containing money, and a handling of the same, in the drawer, at the door of the

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safe, is a sufficient carrying away to constitute the element of asportation in the crime of larceny. *State* v. *Green*, 81 N. C. 560.

Where several articles, belonging to two or more persons jointly, are stolen by one and the same act, there is but one criminal offence, and can be but one prosecution; but if such articles so owned, are stolen at different times and at different places, even though the interval of time be short, and the places but a few yards distant, each theft is a complete and distinct offence, and should be prosecuted accordingly. *Kentucky Ct. of App.*; *Nichols* v. *Commonwealth*, 9 Rep. 114.

Recent Possession.—Possession of stolen goods immediately after the theft may sometimes be almost conclusive of guilt; but the presumption weakens as the period of time between the theft and the possession increases, and may scarcely arise at all, if others besides the accused have had equal access with himself to the place where the goods were found. *Gablick* v. *People*, 40 Mich. 292.

LIBEL.

Recent Possession.—The manager of a large railway company is not within the description of persons referred to in the recent English decisions, confining the granting of criminal informations for libel, to cases of persons occupying an official or judicial position, and filling some office which gives the public an interest in the speedy vindication of their character. *Reg.* v. *Wilson*, 43 U. C. R. 583.

Justification.—In a prosecution for publishing libellous matter in a newspaper, justification cannot be proved unless it be pleaded that the publication was not only true, but for the public good. *Reg.* v. *Hickson*, 2 Weekly Jur. 35. (L. Can. Q. B.)

MURDER.

Intent.—The use of a deadly weapon, causing the death of a person, is *prima facie* evidence that the person so using it, intended the fatal effect consequent upon its use. *Iowa Supreme Ct.*, *State* v. *Moelchen*, 5 N. W. Rep. 186—.

Conduct of Accused.—It is competent to shew that the defendant, before his arrest, admitted that he had made different statements about the deceased, and that he had "lied about it."

The propounding of a theory of the crime by the defendant, is not an admission, but the jury are entitled to consider it, for the purpose of determining whether it is so strange and improbable as to evince a design to mislead. *State* v. *Feltes*, 51 Iowa, 495.

Justification.—An officer, having in custody a prisoner charged with a felony, may, as a last resort, to prevent his escape, shoot and kill him. But it is a felony for him to kill a prisoner charged only with a misdemeanor, who is endeavouring to escape. *Supreme Ct.*, *Tennessee*, *Reneau* v. *State*, 2 Memp. L. J. 237.

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PERJURY.

What Constitutes.—This offence can be committed in a proceeding had before a Justice of the Peace, without any information to justify it, provided the person charged made no objection when before the Magistrate, to the want of an information. *Reg.* v. *Hughes*, 4 Q. B. D. 614.

Perjury may be assigned upon a deposition taken by a sworn stenographer, though it did not appear that there was any consent of parties that the evidence should be taken by a stenographer. *Low. Can. Q. B.; Reg.* v. *Leonard*, 3 Legal News, 138.

An indictment for subornation of perjury must aver that the defendant knew that the testimony which he instigated the suborned witness to give, was false, and that in giving such testimony the witness would wilfully and corruptly commit the crime of perjury. *U. S. Cir. Ct. (La. United States* v. *Dennee*, 3 Woods 39.

RAPE.

What Constitutes—To constitute rape it is not essential that the female shall make the utmost physical resistance of which she is capable. If, in consequence of threats and display of force, she submits through fear of death or great personal injury, the crime is complete. *Kan. Supreme Ct., State* v. *Ruth*, 18 Amer. L. Reg. (N. S.) 578.

If the person was in such an idiotic state that she did not know what the prisoner was doing, and if he was aware of her being in that state, and consequently incapable of expressing assent or dissent, and he attempted to have connection with or without her consent, he could be convicted of an attempt at rape. *Reg.* v. *Barratt*, L. R. 2 C. C. 81. [*State* v. *Atherton*, 50 Iowa 189]

Having connection with a woman, under circumstances which induce her to believe that it is her husband, does not constitute rape. *Reg.* v. *Francis*, 13 U. C. R. 116, *Reg.* v. *Barrow*, L. R. 1 C. C. 156. [See *Reg.* v. *Flattery*, 2 Q. B. D. 410].

RECEIVING STOLEN GOODS.

What Constitutes.—A lad was detained on leaving his master's premises and a policeman sent for who searched him and took a stolen cigar, the property of his master, from him in the master's presence. In consequence of the lad's statement, the cigar was then returned to him, with five others, which the lad took to the prisoner and gave to him. *Held*, that the prisoner could not be convicted of feloniously receiving the cigars knowing them to be stolen, for that they were not stolen property at the time they were received, the master and the policeman having acted in concert in supplying the lad with the six cigars, and instructing him what to do with them. *Reg.* v. *Hancock*, 14 Cox C. C. 119.

A wife, though she may have committed adultery, cannot steal her husband's goods; and therefore the adulterer receiving from her the goods which she has taken from her husband, cannot be guilty of receiving stolen goods. [*Reg.* v. *Featherstone*, Dears. 369 explained] *Reg.* v. *Kenny*, 2 Q. B. D. 307.

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SOLICITING AND INCITING TO COMMIT FELONY.

The offence of soliciting and inciting a man to commit felony is, where no such felony is actually committed, a misdemeanor only, and not a felony under the 24 and 25 Vict., cap. 94, section 2 [31 Vict. cap. 72, section 2, Canada], which only applies to cases where a felony is committed as the result of the counselling and procuring therein mentioned. *Reg.* v. *Gregory*, L. R. 1 C. C. 77.

THREATENING TO ACCUSE OF INFAMOUS CRIME.

The prisoner threatened A.'s father that he would accuse A. of having committed an abominable offence upon a mare, for the purpose of putting off the mare, and forcing the father, under terror of the threatened charge, to buy and pay for her at the prisoner's price. *Held*, that the prisoner was guilty of threatening to accuse, with intent to extort money, within the meaning of the 24 and 25 Vict., cap. 96, s. 47 [32-33 Vict., cap, 21, s. 46 Canada.] *Reg.* v. *Redman*, L. R. 1 C. C. 12.

TRIAL.

Jurisdiction.—A County Court Judge, trying a prisoner summarily under 32-33 Vict. cap. 35 D., has the same authority to convict of an offence under 32-33 Vict. cap. 21, sec, 110 D., instead of that charged as a jury has. *Reg.* v. *Baines et al.*, 42 U. C. R. 208. [See *Reg.* v. *Ct. Denis*, 8 P.R. 16.]

WITNESSES.

Incompetency.—The evidence of an incompetent witness may be withdrawn from the jury, upon the incompetency appearing during his examination-in-chief, although he was examined previously on the *voir dire*, and pronounced to be competent. *Reg.* v. *Whitehead*, L. R. 1 C. C, 33.

Husband and Wife.—A and B are tried together, on a joint indictment for an assault on a peace officer, and the wife of A was offered as a witness to disprove the charge against B, *Held*, that her evidence was properly rejected, but had the husband not been on his trial, she would have been competent. *Reg.* v. *Thompson and Conroy*, 2 Han. (New Brun.) 71.

Joint Defendants.—On the trial of a joint indictment, one of the defendants is not a competent witness for the other, unless he has been acquitted. *U. S. Cir. Ct. (Va.) United States* v. *Clements*, 3 Hughes, 505.

Where no evidence appears against one of several prisoners, he ought to be acquitted at the close of the prosecutor's case. *Quære*, whether without such formal acquittal, he may be called as a witness for his co-prisoner. *Semble*—not unless it appears that he has been joined in order to exclude his testimony. It is in the discretion of the Judge, at the close of the prosecution, to submit such prisoner's case separately to the jury; but he is not bound to do so, and whether he has rightly exercised his discretion or not, cannot be reserved as a point of law.

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Held, that in this case, (being an indictment for arson), it could not be said that there was no evidence against E. H., one of the prisoners; and *Semble*, that, under the circumstances, he could not be called as a witness fo the other. *Reg.* v. *Hambly et al.*, 16 U. C. R. 617.

Four prisoners being indicted for robbery, one severed in his challenge from the other three, who were first tried; *Held*, that he was a competent witness on their behalf. *Reg.* v. *Jerrett et al.*, 22 U. C. R. 499.

Miscellaneous.—Statements elicited on cross-examination, collateral to the issue, are conclusive, and the witness cannot be contradicted by proof of statements inconsistent therewith, unless they tend to show the temper, disposition or conduct of the witness in relation to the cause or parties. *Wilkes* v. *State*, 3 Tex. L. J. 65. *State* v. *Roberts*, 81 N. C. 605.

On a trial for murder, a witness having testified to the existence of certain bloody spots, may be asked to state how they appeared to have been made. *Texas Ct. of App.* *Richardson* v. *State*, 3 Tex. L. J. 283.

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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

[*N.B.*—These notes are designed to inform the Profession of the purport of all decisions of the Superior Courts as soon as possible after judgments are delivered; and to effect this a separate sheet will be issued, whenever necessary, without waiting for our usual number.]

In the Court of Appeal.

[20TH DECEMBER, 1880.]

In re MARTINDALE v. CLARKSON.

PROUDFOOT, V. C.]

Dower in Mortgaged Lands—42 Vict., cap. 22.

Held, that the Act 42 Vict., cap. 22, s.-s. 1, is not retrospective, but applies only to mortgages made after its coming into force.

Remarks upon the Statute and *Robertson* v. *Robertson*, 25 Chan. 486.

Per Patterson, J. A. If the Statute clearly operated as between husband and wife only, not affecting others who may have acquired interests before its passing, it might have been held retrospective.

McClive, for Appellant.

J. H. McDonald, contra.

FINN v. DOMINION S. & I. SOCIETY.

PROUDFOOT, V. C.]

Liability of Principal for Fraudulent act of Agent.

Plaintiff sought a loan of the defendants through W. their agent, and requested them by his application to send the money by cheque addressed to W. The defendants sent to W. a cheque payable to the order of the plaintiff and W. The plaintiff alleged the indorsement of his name to be a forgery, but the evidence indicated that the plaintiff's signature was genuine, and that he had signed before W., and the defendants contended that he had thereby made W. his agent to procure the money for him. W drew the money and absconded with it.

Held, affirming the decree of Proudfoot, V. C., restraining proceedings upon the mortgage and directing a re-conveyance, that the defendants by having made the cheque payable to W's order had imposed upon him a duty

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either to indorse the cheque to the plaintiff, or to see that the money reached his hands, and that they must bear the consequences of their agent's fraudulent neglect of this duty.

Maclennan, *Q. C.*, for appellant.

Bethune, *Q. C.*, contra.

ROSS v. FITCH.

[C. C. NORTHUMBERLAND AND DURHAM.]

Attorney and Client—Relation of—Liability of former when employed by foreign Attorney.

A legal firm in the Province of Quebec retained the defendant an attorney in the Province of Ontario, to bring an action on a promissory note on behalf of the plaintiffs, clients of the former. The amount of the note having been realized, the defendant paid over the same to the attorneys in Quebec by whom he had been retained, treating them in all things as his principals. In an action brought by the plaintiffs against the defendant for the amount of the judgment so recovered,

Held, that the rule that the town agent of a country attorney is not responsible to the client of the latter, is not applicable to the present case; but that the attorneys in Quebec were the agents of their clients, the plaintiffs, to retain the defendant; and that the relation of attorney and client was therefore created between the latter.

Robinson, *Q. C.*, for appellant.

J. B. Clarke, contra.

In re BEATY, AN INSOLVENT.

C. C. YORK.]

Insolvent Act of 1875—Secured Creditors—Proof after sale of, and without valuing, security.

The Imperial Bank, being secured creditors of the Insolvent, realized a portion of their securities after the Insolvency, and, without putting a value upon those they retained which their Manager swore they could not do, as they had no market value, proved for the balance of their debt.

Held, on appeal from the County Judge who had allowed the claim, that by having elected to sell their securities for what they would bring, and having thus put it out of the power of the Assignee to exercise the option of taking them at a valuation for the benefit of the creditors, they were debarred from ranking on the estate.

In re Hurst, 31 U. C. R. 116 remarked upon.

Compare *Deacon* v. *Driffil*, 4 App. 335.

Merritt and *Blackstock*, for appellant.

Bain, contra.

HOMER v. KERR.

C. C. YORK.]

Married Woman—Separate Estate—Joint Contractors.

The income of real estate acquired between 1859 and 1872 by a *femè covert* is her separate estate; and proof of the receipt thereof by her, will support a replication of separate estate to a plea of coverture.

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Per Burton, J. A. If a verdict cannot be sustained against one of two joint contractors it must necessarily fail as to both.

Reeve, for Appellant.

J. W. Kerr, contra.

TROUT v. MOULTON.

C. C. GREY.]

Promissory Note—Improperly stamped—Double stamping—42 Vict., c. 17, s. 13.

Plaintiff refused to take a note from C. because it did not satisfy the requirements of the Stamp Act, but agreed to take it if properly stamped. C. double-stamped it, and plaintiff's book-keeper then took it. Plaintiff having subsequently discovered that C. had omitted to cancel the double stamps, immediately double stamped it and cancelled the stamps according to the requirements of 42 Vict., c. 17, s. 13.

Held, as a fact, that plaintiff took the note in full belief that it was properly stamped; and, therefore, by double stamping it on discovery of the defect subsequently, he was entitled to recover.

Bethune, Q. C., for appellant.

J. K. Kerr, Q. C., contra.

In the Queen's Bench.

MICHAELMAS TERM, 1880.

BEAUMONT v. JARVIS.

Chattel Mortgage—Renewal.

Notwithstanding, R. S. O., cap. 119, the case of *Kissock* v. *Jarvis*, 9 C. P. 156, as to renewing a chattel mortgage from year to year, approved of and followed. *Rule nisi refused.*

Ferguson, Q. C., for Rule.

MOSER v. SNARR.

Promissory Notes—Defence of Forgery—Expert Evidence—New Trial.

An action by an innocent holder against the endorser of promissory notes, in which the defence was that the alleged endorsements were forgeries, was tried twice.

In the first trial the jury disagreed, and in the second they found a verdict for plaintiff. No expert evidence was offered at either trial, though the line of defence had been deliberately adopted.

A new trial for the purpose of giving such evidence was refused.

See *Commercial Bank* v. *Denison*, 1 U. C. R. 13; *McLaren* v. *Muirhead*, 3 U. C. R. 59; *Fawcett* v. *Mothersell*, 14 C. P. 104; *Hooper* v. *Christoe*, 14 C. P. 117; *McDermott* v. *Ireson*, 38 U. C. R. 1.

Bigelow, for plaintiff.

Ferguson, Q. C., for defendant.

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NICHOLSON v. PHŒNIX INSURANCE COMPANY.

Fire Insurance—Misrepresentation.

The plaintiff being insured with the defendants on his stock of groceries and patent medicines in premises used as a grocery store and dwelling, without the knowledge or assent of the defendants habitually retailed liquor to be drunk on the premises; but the jury found that the risk was not thereby increased.

Held, that there was no clear misrepresentation of a material fact, and that the plaintiff was entitled to recover.

W. Mulock, for plaintiff.

Bethune, Q. C., (with him, *Clarke*), for defendants.

[31ST DECEMBER, 1880.]

ROBINS v. CLARK.

Interpleader—Chattel Mortgage—Defective Registration—Fraudulent Preference—R. S. O., Cap. 118.

G. & E., bakers, on the 18th May, 1880, agreed with defendant that if the latter would advance them a quantity of flour they would give them a chattel mortgage on their horses, waggons, and baking utensils. Defendants accordingly delivered from day to day a quantity of flour to G. & E. On 26th May, the chattel mortgage not having been executed, the defendants wrote to G. & E. to have it done. The mortgage was accordingly drawn, covering the sales made, and was executed by the mortgagors only on 10th June, 1880, and filed on the 12th. G. & E. absconded on the 12th, and on the 14th defendants took possession under a clause in the mortgage which allowed them to do so "in case mortgagors should attempt to sell, dispose of, or in any way part with the possession of the goods," and removed them to their own warehouse. The mortgage also contained a re-demise clause. The jurat of the affidavit of *bona fides* was not signed by the Commissioner. The defendants swore that they would not have advanced the flour if this security had not been promised, and that they had no intention of getting a preference over other creditors. The plaintiff's writ of attachment issued on the 17th June, and the Sheriff seized the goods thereunder on the 30th June.

Held, the mortgage must be considered as having been given when the contract to give it was entered into, viz., when the flour was first sold on credit on the 18th May, and therefore there was no preference of defendants, who became creditors only by this act.

Held, also, on the authority of *Risk* v. *Sleeman*, 21 Gr. 250; and *Allan* v. *Clarkson*, 17 Gr. 570, that the agreement being one to enable the mortgagors to carry on their business, the transaction did not come within the mischief aimed at by R. S. O., c. 118; and being therefore a valid security the defendants had the right to retain the goods, subject only to the liability to an action of trespass at the suit of the mortgagors for taking possession pending a demise to the latter.

J. E. Rose, for plaintiff.

E. Douglas Armour, for defendants.

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BERNARD v. COUTELLIER.

Malicious Prosecution—Rejection of Evidence—New Trial—C. L. P. Act, s. 289.

In an action for malicious prosecution, on the opening of the defence the defendant was called and stated that he had learned some facts from certain persons upon which he had caused the plaintiff to be arrested; but on proceeding to state what he had heard, the learned Judge ruled that this was inadmissible, and that the persons who had told him these facts should first be called. They were then called and examined and afterwards the defendant gave his evidence. The jury found a verdict for plaintiff with $500 damages.

Held, by the Court, while disapproving of the ruling of the learned Judge at *Nisi Prius*, that nevertheless, no substantial wrong or miscarriage having been occasioned by the ruling, and the verdict being satisfactory, a new trial should be refused under s. 289 of the C. L. P. Act.

Armour, J. dissented.

J. Reeve, for plaintiff.

Bigelow, for defendant.

In re LEIBES v. WARD.

Prohibition—Deputy Judge—Jurisdiction of—Power of, to give judgment outside of Division to which his deputation refers.

Under the authority of the following deputation :—"Belleville, Ont., "24th July 1880. I hereby appoint E. B. Fraleck Esq., Barrister-at-Law, "as my Deputy to hold the 2nd Division Court of the County of Hastings "on Monday the 26th day of July instant at the Town Hall in the Town-"ship of Sidney.—T. A. Lazier. Junior Judge, C. H.," the learned gentleman therein named tried the case at the time and place appointed, but delivered his judgment, according to a postponement for that purpose, on 2nd August following at the Judge's Chambers, Belleville, outside the limits of the 2nd Division, but within the County, without having named a day and hour for delivery thereof in writing at the Clerk's office.

Held, (1) That the word "Judge" in s. 20 of R. S. O., cap. 47, includes the Junior Judge, and that the deputation was therefore valid. (2) That the proper construction of the same was "to hold the 2nd Division Court of the County of Hastings to be holden on Monday &c.," and that his appointment continued until he had performed the purpose for which it was made. (3) That the effect was to clothe Mr. Fraleck with all the powers of the Junior Judge during the time of his appointment, wherever he might be within the County. And the rule was therefore made absolute to rescind the order made by Galt, J. for a prohibition.

Cameron, J., *dissenting*.

G. B. Gordon, for the Rule.

Holman, Contra.

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HARPER v. DAVIES.

Wrongful dismissal—Contract for yearly hiring—Nonsuit—New trial.

Held, that an action for wrongful dismissal cannot be maintained on a verbal agreement for a hiring by the year, it being "an agreement not to be performed within the space of one year from the making thereof."

Where the plaintiff, in addition, claimed under the common counts a balance due partly for wages and partly on an account, and the jury gave the plaintiff a "lump sum" which would include some damages upon the count for wrongful dismissal, a new trial was directed.

J. Macgregor, for plaintiff.
Allan Cassels, for defendant.

REGINA v. WEHLAN.

Certiorari—Effect of—Rights to proceed for objects other than that for which certiorari was obtained.

Held, that a conviction once regularly brought into, and put upon the files of the court is there for all purposes; and that a defendant may move to quash it at whose instance soever it may have been brought there.

Regina v. Levecque, 30 U. C. R. 509, distinguished.
Cattanach, for the Attorney-General.
Meek, for defendant.

BARBER v. MORTON.

Bill of Exchange—Principal and surety—Witholding of facts from surety—Discharge of latter.

The defendant agreed with plaintiff and P., the acceptor of a bill of exchange, that he would become responsible for the price of such goods as P. should order of the plaintiff. P. sent a written order to the plaintiff, stating the number of articles he wished to purchase aud naming the prices he would pay for some of them. The plaintiff, having obtained the defendant's consent to fill this order, shipped to P. a larger quantity of the goods than was specified in the order. He also invoiced those as to which prices were specified at a higher price than that mentioned in the order, and thereafter, without disclosing to defendant these facts, presented to him for signature a bill of exchange for the price of the goods shipped, representing to him that it was for the price of the goods ordered.

Held, that the defendant, being a surety, was entitled to be informed of the plaintiff's action in the premises and, that having been deceived by the plaintiff, he was discharged from liability.

Hagarty, C. J., *dissenting*.
Falconbridge, for plaintiff.
E. Douglas Armour, for defendant.

WHITELAW v. TAYLOR.

Guarantee—Sufficiency of.

Plaintiff agreed with M. to repair a boiler in the latter's saw mill. During the progress of the work he received the following letter from defen-

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dant :—"As Mr. Morden's saw mill at Bismark is about to come into my "hands right away, and as I am to assume the expense of repairs to the "boiler, be good enough to push forward the work to be done by you on "the boiler as fast as possible, everything is at present at a stand still, "waiting on you. Please push on the work and oblige, Yours truly, R. "Taylor." Plaintiff, without communicating with defendant, went on with the work. The contemplated purchase was not carried out.

Held, that the defendant had not rendered himself liable by the above letter for the price of the work done, and a non-suit was properly entered.

Bethune, Q. C., for plaintiff.
J. E. Rose, for defendant.

DAVIES v. FUNSTON.

Promissory Note—Guarantee—Sufficiency of—Parol Evidence.

The defendant, after a note had become due and while it remained unpaid, endorsed upon it the following words :—"I guarantee the payment "of the within note to Messrs. J. D. & Co., (the plaintiffs) on demand." The evidence showed that the consideration for this guarantee was the giving of time to one C, for whose debt to the plaintiffs the note was given as collateral security.

Held, that the evidence that the giving of time to C. was the consideration for the guarantee, did not contradict the latter, though it was expressed to be "on demand ;" for these words referred to a demand upon the guarantor after forbearance to press C. ; and that such forbearance was a good consideration.

Per Hagarty, C.J. Since R. S. O., c. 117, s. 10, such consideration need not appear on the instrument.

J. Reeve, for plaintiffs.
McCarthy, Q. C., for defendant.

CAMPBELL v. VICTORIA MUTUAL INSURANCE COMPANY.

Fire Insurance—Misrepresentation—Incendiarism.

Action on a fire policy, dated 21st May 1879, on ordinary contents of a barn, which was at the time of the Insurance empty, and on other articles of personal property. In the application for the Insurance dated 13th May, 1879, plaintiff answered "No" to the question, "Is there reason to fear incendiarism, or has any threat been made ?"

At the trial it appeared that one M. had threatened to beat the plaintiff, and the latter being alarmed had sent for the defendants' agent and had had the premises insured, that he would not have insured but for his fear of M., and that he had sat up and watched for a week, and that he believed that the premises had been set on fire, and that he had admitted this to an officer of the defendants after the fire, which occurred on 28th October, 1879. At the time of the fire the barn contained some grain and hay, and a threshing machine, for the loss of which the action was brought. One

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of the conditions on the policy was, that if the assured "misrepresent or omit to communicate any circumstance, which is material to be made known to the Company in order to enable them to judge of the risk" the policy would be avoided.

Held (Armour J., *dissenting*), that the plaintiff could not recover, on the ground that the Insurance having been effected solely on account of his fear of M., the answer to the above question was untrue.

Per Cameron J. The question is equivalent to "have you reason to fear, or do you fear incendiarism?" and, though the bodily threat does not furnish valid grounds for believing that incendiarism was to be feared from the person threatening, yet, since the Insurance was effected on account of such fear, there was a clear misrepresentation in answering the question. And it made no difference that the property to be covered by the policy, was not in existence when the application was made.

Per Armour, J. The word "incendiarism" commonly applies to buildings only, and its meaning ought not to be extended in this case to cover personal property. The property insured was not of an inflammable nature, and the question would be insensible if so extended. The question should be construed strictly with reference to some particular ground of fear, otherwise, the answer "No" referring to the first part only, viz: "Is there reason to fear incendiarism?" would be in every instance untrue; for every Insurance is effected because the assured fears the happening of fire by accident, neglect, or design. And the evidence in this case showed that there was no such reason as, operating on the minds of a majority of prudent men, would cause them to fear incendiarism, and therefore, the question was truly answered.

The question was also properly answered as to property intended to be covered by the policy, but not then in existence, as to which no fear could exist.

Lount, *Q. C.* for plaintiff.
McCarthy, *Q. C.*, for defendants.

In re HIGH SCHOOL BOARD OF DISTRICT NUMBER FOUR OF THE UNITED COUNTIES OF STORMONT, DUNDAS AND GLENGARRY.

and

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF WINCHESTER,

and

In re THE SAID BOARD

and

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF WILLIAMSBURG.

High School Districts—Alteration of boundaries—Continuance of liability for High School in severed part.

On 29th April 1878, High School District number Four of the United Counties of Stormont, Dundas and Glengarry being composed of the

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village of Morrisburg and the Townships of Winchester and Williamsburg, the Board of Education of the Incorporated Village of Morrisburg resolved that the sum of $7000 be levied on the said District to enable them to erect a school-house. On the 27th May 1878 it was resolved that the Chairman of the Board be authorized to make a requisition on the Municipalities forming the District, to provide their rateable proportions of the sum of $7000. In pursuance of this resolution, the Chairman, in writing under his hand and the seal of the Board, required the Municipalities of the Townships of Winchester and Williamsburg to raise their proportions. The request was served on the Reeve of Williamsburg on 18th July, and on the Reeve of Winchester on the 19th July. At a meeting of the Board on the 24th of June 1878 it was resolved that the Chairman should levy on these Municipalities a further sum of $400 for High School maintenance, which was demanded on the 19th July 1878. On the 27th June 1878, in compliance with a request of a majority of the Reeves and Deputy Reeves of the County of Dundas, the Council of the United Counties passed a by-law enacting that District number Four should be composed of the Village of Morrisburg only. This by-law was quashed on the 5th February 1879; but under special circumstances the rule was re-opened, and the by-law was on the 2nd February 1880 finally quashed in so far as it changed the limits of the High School Districts.

Held (Hagarty, C. J. *dissenting*), reversing the decision of Galt. J., that the Municipalities of the Townships of Winchester and Williamsburg were still liable to contribute their proportions towards the erection of the High School.

McCarthy, *Q. C.*, for the appeal.

Bethune, *Q. C.*, contra.

In re BLAND v. ANDREWS; HOWARD, GARNISHEE.

Prohibition—Division Court Clerk—Garnishing money in hands of.

Semble, that money upon being paid to a Division Court Clerk on the final disposition of a case, is paid in to the use of a suitor and is garnishable.

Per Cameron, J. It does not become a debt from the Division Court Clerk to the suitor till demand made.

Where the garnishee who was Clerk of the 1st Division Court of the County of York, had submitted himself to the jurisdiction and had paid the money in his hands into the 10th Division Court of the County, from which latter Court the summons issued, and since the Judge of the Division Court had acted within his jurisdiction in determining whether the garnishee was indebted to the primary creditor and whether the debt was attachable,

Held, that the order of Galt, J. discharging a summons for a prohibition was right; and a rule nisi to rescind the same and for a writ of prohibition was discharged.

Dolphin v. *Layton*, L. R., 4 C., P. D. 130, remarked upon.

Murdoch, for the Rule.

Williamson (*Patterson* with him), contra.

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REGINA v. McALLEN.

Certiorari—Validity of, questionable on motion to quash conviction.

In showing cause to a rule nisi to quash a conviction, objection may be taken to the regularity of the certiorari, and a separate application to supersede it need not be made.

Where, therefore, on an application made after notice to the convicting justices for a rule for a certiorari the rule was refused, and on a subsequent *ex parte* application on the same material, the rule was obtained, it was

Held, affirming the decision of Galt, J. that the notice of the first application would not enure to the benefit of the defendant in his second application, and that the certiorari was irregularly obtained for want of notice to the convicting justices; and a rule to quash the conviction was therefore discharged.

Cameron, J. dissented, being of opinion that a substantive motion should be made to quash the writ of certiorari; and that the conviction being before the Court under a writ of certiorari unsuperseded, the validity of the same should be inquired into.

Dr. McMichael, Q. C. (*Ogden* with him), for the appeal.

Cattanach, contra.

Note, that in this case the conviction was wrongly brought up, while in *Regina* v. *Wehlan* supra, it was rightly brought up.

In the Common Pleas.

MICHAELMAS TERM, 1880

STEELE v. THE GRAND TRUNK RAILWAY COMPANY.

Railways—Carriage of Goods—Owner—Notice of Arrival.

This was an action against the defendants for breach of contract to safely carry and deliver to the Plaintiff certain goods delivered by the Plaintiff to the Defendants to be carried from Hamilton to Toronto. The Defendants objected that the action being in case the Plaintiff must fail, as they contended the evidence showed that the Plaintiff was not the owner of the goods, having sold them to one H.; and further that the Plaintiff had omitted to give notice to the Defendants within thirty-six hours after the delivery of the goods to him by the Defendants, as required by the terms of the agreement under which the goods were alleged to have been carried.

Held, that the objections failed; for that the evidence showed (i) that the Plaintiff was the owner of the goods; and (ii) that the goods were not safely carried to Toronto and delivered to the Plaintiff, and therefore the defendants could not set up the omission to give the said notice &c. The Plaintiff was therefore *held* entitled to recover.

Mackelcan, Q. C., for plaintiff.

McMichael, Q. C., for defendants.

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HENRY v. GILLEECE.

Will—Construction of.

A will contained the following clause:—"*Third.* I give and bequeath to my daughter-in-law E. D., widow of my son W. D. deceased the proceeds of the residue of my real estate situate * * * To have and to hold the same to her use and the support of my son W.D's children during her natural life, or as long as she remains the widow of my son W. D.; and in the event of the death of my daughter-in-law then to my said grandchildren, to have and to hold the same as long as they remain minors. *Fourth*, I give, devise and bequeath to my grandson P. D. his heirs and assigns, all my real estate being [the same land above mentioned], To have and to hold the same to him and his heirs and assigns, to his and their use and behoof forever, subject to the condition set forth in the third clause of this instrument." E. D. the widow of W. D., after the death of the Testator, and before the commencement of this suit, married again and was still living.

Held, that the proper construction of the above clauses was to give the lands to the minors immediately on the determination of the mother's estate, whether by marriage or death.

Milligan, for plaintiff.

MAYER v. THE GRAND TRUNK RAILWAY COMPANY.

Railways—Warehousing of Goods—Condition as to Liability.

The plaintiff shipped goods from Montreal to Toronto by the defendants' railway, which duly arrived at Toronto, and were placed in the defendants' warehouse there. By one of the conditions, under the heading *notices and conditions of carriage*, endorsed on the request note signed by the plaintiff, and the shipping receipt received from the defendants at the time of shipment at Montreal, as well as on the *Freight Advice Note* received by him on the arrival of the goods at Toronto, and specially referred to on the face thereof, respectively, it was provided that the Company should not be liable for any goods left until called for, or to order, and warehoused for the convenience of the parties to whom they belong, or by, or to whom they are consigned, and that the warehousing of all goods would be at the owner's risk and expense. The plaintiff, without having, as he stated, read over the conditions on receipt of the freight advice note, called at the warehouse and received permission to leave the goods there, nothing being said about storage. The goods having been lost the plaintiff sued the defendant to recover their value.

Held, that he could not recover; for that under the terms of the special condition no liability, which if there were any, would be that of warehousemen, was imposed on the defendants.

Tilt, for plaintiff.

J. K. Kerr, Q. C., contra.

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HARVEY v. PEARSALL.

Dower—Declaration Claiming Dower after Admission of Right to Dower—Sufficiency of—Pleading.

A writ issued under the Dower Act, with the statutory notice endorsed thereon, notifying the defendant to enter either an appearance with a denial of his being the tenant of the freehold, or an appearance only; and that unless such an appearance, with or without such denial, was entered, the plaintiff could sign judgment for the sum claimed with costs of suit; and further notifying the defendant that she claimed damages for the detention of her dower. The defendant filed and served on the plaintiff's attorney an appearance, together with an acknowledgment that he was tenant of the freehold, and consenting to the plaintiff's having judgment for her dower therein, and that she might take the necessary proceedings to have the same assigned to her. The plaintiff thereupon filed and served a declaration claiming dower and damages.

Held, declaration bad in claiming dower, which defendant had acknowledged the plaintiff was entitled to; but leave was granted to the plaintiff to amend on payment of costs, restricting the declaration to the claim for damages alone, so that the question would be determined whether in such case damages are recoverable.

Allan Cassels, for defendant. No one contra.

[31ST DECEMBER, 1880.]

JOHNSTON v. CHRISTIE, J. SKINNER, P. SKINNER AND FOYLE.

Trespass to Land—Title.

Plaintiff agreed in writing on 18th Nov. 1878, with one Q., agent for St. G., to purchase the land in question. Q. had a power of attorney from his principal to protect and lease, but not to sell and convey, lands. Plaintiff paid one instalment only of his purchase money to Q, who said that he had forwarded it to St. G., who had ratified the bargain. On the Monday after the 18th Nov. 1878, plaintiff went on the lot with Q's permission, and cut and removed some timber. The defendants, Christie and J. Skinner cut timber on the land under a mistake as to boundaries, but, after the limit was ascertained, offered plaintiff compensation for this; though Christie swore that he meant his offer to be for Plaintiff's interest in the lot. They also had offered to buy timber from the plaintiff.

Held, that there was sufficient evidence of title to constitute the acts of entry made by the plaintiff on the land constructive possession.

It was objected that, being in default to St. G. on his agreement, and time being made thereby of the essence of the contract, the plaintiff's title had expired. But

Held, that the defendants, not claiming under St. G., could not set up his right to avoid the agreement.

It was suggested that St. G. might still be in a position to bring an action for the same trespasses, and it was therefore ordered that the rule

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should not issue until a release from St. G. to the defendants against whom the verdict went, as to the trespasses in question should be filed.

The proceedings were irregular, as against P, Skinner and Foyle, and the verdict, as against them, was set aside.

Lount, Q. C., for plaintiff.
McCarthy, Q. C., for defendants.

ONTARIO CO-OPERATIVE STONE-CUTTERS ASSOCIATION v. CLARK, *et al.*

Co-operative Association—Power to contract notwithstanding R. S. O., cap. 158, s. 15.

Held, that sec. 15 of the R. S. O. cap. 158, does not prohibit a co-operative association, formed for the purpose of carrying on any "labour" or "trade" from entering into contracts necessary for, or incidental to such labour or trade, such contracts being for work and service, while the language of the above section is appropriate to the case of buying and selling goods and other property.

Falconbridge, for plaintiffs.
J. E. Rose, for defendants.

DANCEY v. BURNS.

General Average—Stranding of Vessel to save crew.

Where the master of a vessel carrying a cargo, after vainly endeavoring to prevent the vessel from stranding, voluntarily turns her head to the shore, not for the purpose of saving the cargo, but so as to enable the crew to escape, and as a result of that voluntary stranding the loss of the cargo is prevented, the cargo so saved is not liable to general average. The principle of *Shepherd v. Kottzen*, L. R. 2 C. P. D. 585, adopted and followed.

Ferguson, Q C., for plaintiff.
Falconbridge, for defendant.

SMALL v. RIDDEL *et al.*

Action for Benefit of Joint Endorser—Partnership—Contribution—R. S. O., Cap. 116, secs. 2, 3 and 4.

A promissory note made by the president and secretary of a syndicate, formed for the purpose of completing the Hamilton & Dundas Street Railway, in favor of O., S., and the defendants, was by them endorsed to the Canadian Bank of Commerce. On the day the note fell due O. and S. paid the same; S., at the time of so doing, directing the Bank to endorse it to the plaintiff, who gave no consideration therefor. This was accordingly done and the present action brought against the defendants as endorsers of the note.

Held, as a fact, that S., by his payment intended to satisfy the note; and therefore the plaintiff, by the endorsement to him, took just such rights as

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S. after such payment had with respect to the note. And that, the defendants being co-partners with S. in the above mentioned railway undertaking, and this note being made for a purpose directly relating to, and not in a matter merely collateral to the partnership, they were not liable to S. in an action against them as endorsers. So neither could the plaintiffs recover against them.

In an action by a third person holding a note for the benefit of a joint endorser against his co-endorsers who are sued as endorsers, such joint endorser cannot claim contribution under R. S. O. cap. 116, secs. 2, 3 and 4; for he should sue each of the defendants separately for his share of the contribution and not the two jointly; and should also declare specially for that proportion as contribution, and should not sue the defendants as endorsers for the full amount of the note.

Held, further, that the statute above referred to is not applicable to partnership transactions.

Ferguson, Q. C., for plaintiff.
Bruce, for defendants.

CARTER v. HATCH.

Investing Money on Mortgage—Breach of Duty—Onus of Proof—Pleading.

It is *prima facie* a breach of duty in a person intrusted with money to invest on the security of real estate, to lend it on the security of a second mortgage, however good that security may apparently be; and the *onus* is on the defendant to prove that the plaintiff authorized such investment. Where the agent to invest derives his profit not from the lender but from the borrower, the proper mode of stating the consideration is to aver, "that in consideration the plaintiff *would deliver to the defendant* the sum, etc., to be invested by him for the plaintiff upon good and sufficient security upon real estate, *so as to enable the defendant to charge the borrower of the money for his services in the premises, etc.*"

Dunbar, for plaintiff.
J. E. Rose, for defendant.

CULVERWELL v. CAMPTON.

Principal and Agent—Right to Double Commission.

An agent employed by his principal to effect an exchange of property with another, cannot retain for his own benefit a commission received from that other in the transaction. But where the principal is aware that the agent has received such commission and makes no objection to his retaining it, but with full knowledge of the fact, negotiates with him for a settlement of the amount of his remuneration, he cannot in an action for such remuneration set off the amount received by the agent from the other party.

J. E. Rose, for plaintiff.
Beaty, Q. C. (with him. *Allan Cassels*), for defendants.

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SKIRVING v. ROSS.

Slander—Medical Practitioner—R. S. O., cap. 142, sec. 21.

A gentleman registered as a medical practitioner in Scotland, but who has neglected to comply with the provisions of R. S. O., cap. 142, sec. 21, is not in a position to maintain an action against a person for slandering him in his profession.

Bethune, Q. C., for plaintiff.

Ball, Q. C., for defendant.

OLIVER v. NEWHOUSE.

Lease of farm stock—Power to sell.

A father made a lease of his farm stock and implements of husbandry to his son for the term of five years determinable at will, with power to the son to sell or exchange the stock and implements in his discretion; so however, that any goods sold should be replaced by others of equal value.

Held, following the older authorities, that the lease gave the son only a limited interest in the goods during the term; that such goods as he did not part with remained just as if no power to sell had been given; that all goods brought on the premises in lieu of the demised goods sold or exchanged under the power became subject to the terms of the demise.

And, even assuming that the property in the goods passed to the son, yet the lease having been determined by re-entry of the father, the residue of the original goods and the substituted goods became vested in him as the original goods had been, before the execution of the lease, and an execution creditor who had recovered judgment after such re-entry, had, therefore, no claim to the goods.

Ferguson, Q. C., (with him, *McFadden*) for plaintiff.

McCarthy, Q. C., (with him, *Milligan*) for defendant.

POSTMASTER-GENERAL v. McCOLL.

Damage, proximate cause of.

One Cæsar, a postmaster at Ramsgate, took from the mail matter in his charge, a letter containing several cheques, and, having forged the endorsements, presented them to a bank where they were cashed upon Cæsar's giving an undertaking as to the genuineness of the endorsements. On a special case, as to the liability of the sureties of Cæsar on a bond, conditioned that the postmaster "should not commit any theft, larceny, robbery or embezzlement of, or lose or destroy, or commit any malfeazance, misfeazance or neglect of duty, from which may arise any theft, larceny, robbery, embezzlement, loss or destruction of any money, goods, chattels, valuables or effects, or of any letter or parcel containing the same,

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Held, that the bank, on whose behalf the Postmaster-General prosecuted this action, was entitled to nominal damages only for the larceny of the letters; and could not recover for the loss occasioned by the payment of the cheques, as the forgery, and not the larceny, was the proximate cause of the damage so resulting.

Semble, that the doctrine of estoppel by executing instruments in blank is confined to negotiable instruments, and does not apply to deeds.

Hodgins, Q. C., for plaintiff.
Robinson, Q. C., for defendants.

FISHER v. GRAHAM.

Breach of Promise of Marriage—Evidence.

In an action for breach of promise of marriage, the evidence showed that the plaintiff, who had been seduced and had a child by the defendant, had told her father that "she was going to get married to the defendant"; and that the plaintiff's father had said to defendant, "and you promised to marry her," to which the defendant replied, "I will marry her if it is mine." The jury found a verdict for plaintiff, with $200 damages.

Held, on motion for a nonsuit, that the admissions of the defendant, and the statement of the plaintiff to her father, her apparent acquiescence coupled with her probable desire, under the circumstances, to bring about a marriage, were sufficient evidence to go to the jury of a mutual agreement to marry, though there was no actual promise proved on plaintiff's part.

Where the promises were laid in the first count of the declaration to marry within a reasonable time, and in the second count to marry on a day now past; and the evidence given in support of them was, that defendant had said he would "marry her if the child were his," and that "he could not do anything till he got some part of the land off the old man, and he would marry her then," that the child was his, and that he had admitted some time before the alleged promise that he had got 50 acres of his father's land and owned it,

Held, sufficient to sustain both counts.

B. Doyle, for plaintiff.
Falconbridge, for defendant.

NORTH OF SCOTLAND CANADIAN MORTGAGE CO. (LIMITED) v. GERMAN.

Mortgage—Release of Equity of Redemption—Merger.

Where a mortgagor, unable to pay his interest, gave a release of his equity of redemption to the mortgagees, by ordinary short form deed, "to

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save the costs of a sale," and it was proved that if there were any surplus after a sale, it was to have gone to defendant,

Held (Galt, J., *dissenting*), that there was no merger of the mortgage debt.

Per Wilson, C. J.—From their liability to account for the surplus the plaintiffs had, from being mortgagees strictly, become trustees substantially.

Per Osler, J.—Whether there was a merger of the mortgage debt is a question of intention; what the intention of the parties was is a question of fact.

Bethune, Q. C., for plaintiffs.

Crickmore, for defendants.

MITCHELL v. McDUFFY.

Illegal Distress—Trespass—Damages—2 W. & M., sess. 1, ch. 5.

Defendant leased land to plaintiff for a term, during which the latter was to make improvements, and at the end of the term the amount of rent payable to the defendant was to be fixed by arbitration. Defendant distrained during the term. The action was tried twice, in each case the jury finding for the plaintiff, and assessing damages at double the value of the goods.

Held, that the defendant, having no right to distrain, on account of there being no fixed rent agreed upon, was a trespasser and liable to damages, but not to pay double the value of the goods; as it was not a case coming within the Statute 2 W & M., sess. 1. ch. 5, which refers to a wilful abuse of the power of distress; and it could not be said that in this case there was nothing due, *i. e.* payable, until the accounts had been taken by arbitration.

J. K. Kerr, Q. C., for plaintiff.

Ferguson, Q. C., for defendant.

NEILL v. THE TRAVELLERS' INSURANCE COMPANY.

Accident Policy—Violation of conditions—Death from voluntary exposure to unnecessary danger.

J. N. being insured with defendants against death by accident was killed by a railway train in the yard of the Northern Railway Co. at Toronto, which it was unlawful for him, not being an employee of the Company, to enter, and into which he had unaccountably driven. He was last seen by a witness who watched him, driving over and among a network of tracks, and who, while he was entangled in a switch gate, warned him not to go farther or he would be killed, to which deceased made no answer. By certain of the conditions of the Policy it was stipulated that it should not "extend to

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any bodily injury when the death or injury may have happened in consequence of voluntary exposure to unnecessary danger, hazard or perilous adventure, or of violating the rules of any Company, etc., or while engaged in, or in consequence of, any unlawful act." The jury found a verdict for plaintiff.

Held, on motion for a nonsuit pursuant to leave reserved, that the plaintiff could not recover, and a nonsuit was entered.

Ferguson, Q. C., (with him *G. H. Watson*), for plaintiff.
McCarthy, Q. C., for defendant.

McCARTHY v. ARBUCKLE.

Ejectment—Mesne profits—Improvements under mistake of title—Referring back to Master in Chancery.

In an action of ejectment where the defendant claims a lien for improvements under R. S. O., cap. 95, sec. 4,

Held, that the plaintiff is entitled to an account of rents and profits to be set off against the value of the improvements.

Where it was referred to the Master in Chancery to ascertain the value of the defendant's improvements, and he simply reported their value, being of opinion that under the terms of the rule he could not take an account of mesne profits,

Held, that the Court had power to refer the matter back to him for this purpose.

Dr. Snelling, for plaintiff.
W. M. Hall, for defendant.

SILSBY v. THE CORPORATION OF THE VILLAGE OF DUNNVILLE.

Municipal Corporation—Contract not under seal—Liability of, for acceptance of fire engine by resolution of Council not under seal.

The defendants having invited tenders for the supply of a steam fire engine accepted the plaintiff's tender, whereupon an engine was forwarded for acceptance subject to test. A by-law passed by the Council to raise the necessary amount to pay for it, was submitted to the ratepayers and carried, but being informal was repealed, and another by-law was sub-

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mitted to them and rejected. Before the second by-law was voted upon, the engine arrived and was tested on behalf of the defendants, placed in their engine house subject, however, to customs duty, and accepted by resolution of the Council in writing not under seal.

Held, that the plaintiff could not recover because, (i.) It was not a common ordinary or insignificant matter for which it was not worth while to contract under seal; (ii.) Because there had been no acceptance under seal; (iii.) Because there was no satisfactory evidence of acceptance in any manner; (iv.) Because the ratepayers for whose benefit the intended contract was made, had repudiated it; and a verdict was entered for defendants.

Mackelcan, Q. C., for plaintiff.
Bruce, for defendants.

STEVENSON v. CITY OF KINGSTON.

Salaried Attorney—Right of, to recover costs from opposite party.

The defendants paid their solicitor a fixed salary to cover all his professional services to the City, exclusive of counsel fees and other disbursements paid by him; the solicitor to have the right to costs from parties against whom the Corporation should succeed, and to be entitled to disbursements only when they should fail. The defendants entered judgment against the plaintiff, and the usual costs were taxed. A rule was taken out on behalf of the plaintiff to refer back the bill with a direction to the Deputy Clerk to disallow all costs but disbursements.

Held, (Wilson, C. J., *dissenting*), that, inasmuch as costs were awarded to the *defendants*, who, under their agreement, were not liable for these specific costs to their attorney, disbursements only should be taxed; following *Jarvis* v. *G. W. R. Co.*, 8 C. P. 280.

Ho an for plaintiff.
Riordan, for defendants.

McMASTER & CO. AND THE BANK OF OTTAWA v. GARLAND.

Interpleader—Equitable Assignment of proceeds of Sale of Goods—Registration of—R. S. O., cap. 119.

B., at the suggestion of McMaster & Co., his creditors, consigned to S. S. & Co. for sale a quantity of goods. To enable him to do this, Mc-

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M. & Co. advanced him $250 to pay certain claims; and S. S. & Co. accepted his draft for $800, on 31st May, 1880, which the Bank of Ottawa discounted. B., on 28th May, 1880, sent to McM. & Co. an order for $2159 upon S. S. & Co., to be paid out of the proceeds of the goods which S. S. & Co., by letter, on 31st May, 1880, agreed to pay, if there were sufficient funds after paying their own charges and commission. On the 31st May, 1880, B. gave an order in favour of the Bank of Ottawa upon S. S. & Co. for $1461.47, to be paid out of proceeds of sale, and S. S. & Co. were notified by telegram, which they acknowledged. The goods were advertised for sale on 11th June, 1880, and on that day, by virtue of a writ of *fi. fa.*, dated 8th June, 1880, against the goods of B., at the suit of defendants, the Sheriff took possession of the goods and interpleaded. The defendants, on ascertaining the amount of S. S. & Co.'s claim, paid it.

Held, that by so doing they had not released the goods from the lien of S. S. & Co. for the benefit of other creditors and to their own prejudice; but that S. S. & Co. thereafter held the goods for their (defendants') benefit to the extent of their (S. S. & Co.'s) lien, just as they did for the other creditors on their respective orders; and defendants were therefore entitled to rank first for this amount; and then the plaintiffs according to their priority.

It was contended for defendants that the orders given to the plaintiffs were within the Chattel Mortgage Act, and should have been registered; but

Held, that the delivery of the goods by B. to S. S. & Co., followed by the actual and continued change of possession, dispensed with the necessity for registration.

Per Osler, J.—Under the authority of *Paterson* v. *Kingsley*, 25 Grant, 425 such orders amount to equitable assignments, and are not within the spirit of the Act.

J. K. Kerr, Q. C. (with him *Redford Mulock*), for McMaster & Co.

Beaty, Q. C. (with him *Allan Cassels*), for Bank of Ottawa.

McCarthy, Q. C. (with him *Creelman*), for defendants.

REID v. MAYBEE.

Malicious arrest—Reasonable and probable cause—Termination of proceedings before Magistrate—Endorsement of warrant—New Trial.

Defendant went with plaintiff to get a draft cashed for the latter; and during the journey the plaintiff boasted that he was going to get a much

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larger sum from Scotland whence this draft came. It did not appear that the plaintiff made this statement with a view to obtaining credit with defendant. He deposited some of the money with defendant, and obtained goods from him for some time, which were charged against the funds on deposit. Having largely exceeded his deposit, defendant had him arrested for obtaining goods under false pretences, thereby hoping to have his account settled. The plaintiff was allowed to go on his own recognizance to appear the next day, but being unwell did not appear, and, the charge not being pressed, the matter dropped and the Magistrate made his order, not in writing, for a discharge.

The warrant was issued in the United Counties of Northumberland and Durham, and was endorsed by a magistrate of the county of Peterboro as follows:—"This is to certify that I have endorsed this warrant to be exe-"cuted in the county of Peterboro," and was executed in the latter county; there was no evidence of any proof to the Peterboro magistrate of the handwriting of the issuing magistrate, and the endorsement did not follow the schedule K. of 32 & 33 Vict., c. 30, s. 23. A verdict was entered for the defendant at the trial.

Held, that on account of the defect in the warrant the arrest was illegal and the plaintiff was entitled to recover in trespass.

Held, also that by the production of the papers and proceedings had before the magistrate it sufficiently appeared that the proceedings on the warrant had terminated.

A new trial was therefore directed.

J. W. Kerr, for plaintiff.

J. E. Rose, for defendant.

Vacation Court.

REGINA v. HOWARD.

[CAMERON, J., 16th November, 1880.

Selling Liquor without License—Liability of Servant—R. S. O., cap. 181.

The defendant was a servant of one Ward, keeper of an unlicensed tavern, and was convicted of selling liquor in her master's absence.

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Held, conviction good, though, but for *Regina* v. *Williams*, 42 U. C. R. 462, the master would seem to be alone responsible under the Liquor License Act, R. S. O., cap. 181.

Quære, whether the Local Legislature can limit, or authorize municipalities to limit, the number of licenses; and as to the effect of the decision of the Supreme Court in *City of Fredericton* v. *The Queen*, 3 S. C. R. 505.

Fenton, for the Crown.

A. Macnabb, for defendant.

Common Law Chambers.

Re FLINT AND JELLETT, ATTORNEYS.

[WILSON, C. J., 29th October, 1880.

Ejectment by Mortgagee—Costs.

L, being the holder of a mortgage upon which an instalment of interest was due, instructed his attorney "to take legal proceedings on the securities unless the interest was paid on the 12th April." The Mortgagor called on the 12th April, and told the Attorneys that he intended shortly to pay off the mortgage, and hoped no costs would be incurred. On 15th April the Attorneys issued a writ of ejectment and notice of sale, and served them on the Mortgagor on 23rd April, when he called to pay off the mortgage. They also refused to take the principal money.

Held, that the Attorneys were entitled to the costs of the ejectment suit, but to no other costs whatever.

Crickmore, for Attorneys.

Aylesworth, for Mortgagor.

PATULLO, *et al.*, v. CHURCH.

Attorney and Client—Costs—Taxation.

[CAMERON, J., 6th November, 1880.

Where a client applies for taxation of an attorney's bill after the expiration of a year from its delivery, he should show such circumstances as would have justified a reasonable man in refraining from seeking such taxation, or that he was prevented by some unreasonable cause. Where

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judgment had been signed against the client in an action on the bill during the pendency of negotiations for a settlement, this was

Held, a sufficient reason for opening up the judgment and directing a taxation.

Clement, for the Attorneys.

Aylesworth, for Defendants.

Second Division Court, Wentworth.

BANK OF MONTREAL

v

STATTEN *et al.*

W. F. FINDLY, *Claimant.*

Interpleader—Value of Goods above $100*—Taking Evidence in Writing—Division Courts Acts*, 1880; *sec.* 5.

An interpleader issue to try the right to certain chattel property seized by the Bailiff of this Court under execution at the suit of the Bank of Montreal. The value of the goods in question exceeded the sum of $100.

Held, by SINCLAIR, J., C. C., Wentworth, that the words of the section requiring the Judge to take down the evidence in writing only applies to a case "in which *the sum* sought to be recovered exceeds one hundred dollars;" that an interpleader issue does not come within that class of cases, the right of property in goods and not the recovery of a money demand being the question to be tried.

See *Munsie* v. *McKinley*, 15 C. P. 50; *Sinclair's* D. C. Act, 1880; page 42, and cases there cited.

Gwyn, for execution creditors.

Muir, for claimant.

(Report by H. C. Gwyn, Esq,)

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THE
CANADIAN LAW TIMES.

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THE LATE CHIEF JUSTICE OF ONTARIO.

IN the far off sunny south of France while the day declined, passed away the Chief Justice of Ontario, in the meridian of his days, while

> "Nothing in Nature's aspect intimated
> That a great man was dead."

On a bleak afternoon last November when many eminent and many warm friends gathered at the Toronto station to bid him adieu and God speed, as he departed on his search in a far off land for a recovery of the health lost in the service of his country, there were few who, on exchanging the warm hand grasp with him, did not fear that the quest was vain, and none who did not yearn for a day when he would again be in our midst, gracing the Bench with his cultured talents and shedding about him in society the lustre of his brilliant attainments.

Hardly had his safe arrival in Europe been announced to us, when a cable message, which to his family on this side of the Atlantic, must have sounded as a wail of despair, announced his prostration from the result of cold taken on the voyage. Some hopeful variation in his condition was once or twice heard of, but early on the 5th of January we learned that on the previous day in the Hotel de l'Europe, at Nice, two of the nearest and dearest of his own family as they watched and waited beside him, found that all they had feared and prayed against, had at last come, and that he had left them there alone.

Those who knew him at the Bar know well that we write in no fulsome way, when we say that he was a sound lawyer, a quick and ready advocate, a generous upright adver-

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sary, and a warm and honest friend. His legal attainments were so vast that in putting them to the best use for his clients in the conduct of causes, as he was always wont to do, he could well afford to be above petty devices and arts—never was it said that he used them with the object of gaining a success.

His generosity and the charm of his manner in victory brought no sting of defeat to his adversary. To succumb to him, brought no chagrin—case and adversary were won together, and won as only a man of honour could win—fairly.

In defeat he would retire with a grace of manner fitting to a man of his evenness of mind, which of necessity placed Justice above everything.

To those who were serving under his guidance when he was elevated to the Bench in the fall of 1875, the announcement brought only the feeling of regret that the dignity of his new and well won honours necessarily severed that intimate relationship of sympathy and warm friendship which he had always fostered and encouraged between himself and them.

There was not one to gainsay his title to the highest seat on the Bench. Genius, rare talents, large experience and extensive knowledge qualified him for the task which he undertook, and the pages of the reports of cases heard in the Court of Appeal, evidence that the high hopes entertained by his admirers at the beginning of his career as a Judge were not vain. Simplicity and lucidity of statement marked his judgments even where the facts of a case were most involved and the legal technicalities most abstruse. That these features were the result of great learning and eminent capacity was plain to those who listened to the oral judgments which, after consultation with his brother Judges, frequently followed close upon the argument of cases in his Court. While his loss is felt keenly by his own kindred and with sorrow by his friends and acquaintance, truthfully and respectfully can we say that not least will it be felt by his brother Judges in the Court which owed a large mea-

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sure of its strength and dignity to his presiding presence. His courtesy to the Bar will long be remembered by the Junior Advocates whose fortune it was to appear before him. Kindness and encouragement met the beginner who essayed to address him. Seniority at the Bar gave no passport to his attention—many a junior first won assurance of his own powers by the attention which in the kindliness of his heart the late Chief Justice bestowed to the beginner.

At the opening of the January sittings of the Court of Appeal, his loss was touchingly referred to by Mr. Justice Burton, one of his most intimate friends, in the feeling address which is well worthy of a perpetuation more lasting than can be given by an insertion in this publication; and this tribute may well close an article which, penned, with a loving hand, attempts to do justice to the virtues of a man whose loss cannot be replaced.

In adjourning the Court on the first day of the sittings Mr. Justice Burton said:—"My colleagues agree with me that it is not fitting to proceed with the ordinary duties of the day without some allusion to the loss the profession, the public, and especially the members of this Court, have sustained by the death of the eminent Judge who but a few days since filled the position of President of the Court and Chief Justice of Ontario.

"It is perhaps a singular coincidence that within a few weeks death has robbed this and the Mother Country of two of their most distinguished Judges, both of them men in the prime of life, to whom there appeared to be opening a brilliant future, and as to each of whom I may say, I think without exaggeration, a national loss has been sustained. Each of them, however, has left an imperishable monument of his learning and ability in the reports of their published judgments, which may well be referred to as models of judicial style.

"Many of those who now hear me have listened with pleasure and admiration to the oral judgments delivered from where I am now sitting by the distinguished Judge whose

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death we are now deploring, and must have been struck with the simplicity, ease, and grace of manner, combined with depth of thought and elegance of diction, with which those utterances were delivered; but few beyond his intimate acquaintances were aware of the untiring energy with which he investigated those cases requiring more careful preparation, or that the rising sun has occasionally found him still engaged in examining and verifying the authorities upon which he proposed to base his decisions.

"His loss is too recent, and my appreciation of it too keen, to permit me to make more than a passing reference to his personal and social qualities. 'To know him was to love him.' My heart is too full for me to venture to say more.

"We may, one and all of us, whether on the Bench, at the Bar, or the youngest student entering for the first time the portals of the profession, safely adopt him as our model, combining as he did in his own person the kind and courteous gentleman, the brilliant and able advocate, the upright and impartial Judge.

"I wish that I had the command of language to do justice to his many virtues and his great intellectual gifts; but I yield to none of his numerous friends in admiration of his character and in tender and affectionate regard for his memory."

W. B.

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OF CHATTEL MORTGAGES WHERE THE TERM OF CREDIT EXCEEDS A YEAR.

In *May* v. *The Security Loan and Savings Co.*, 45 U.C.R. 106, Chief Justice Hagarty is reported to have said, "The chattel mortgage, for the security of the plaintiff as endorser, apparently fails on the objection as to the time of credit extending over twelve months, on the doctrine of *Kough* v. *Price*, 27 C.P. 309, and *Ontario Bank* v. *Wilcox*, 43 U.C.R. 460."

The present Chattel Mortgage Act (R.S.O., cap. 119), so far as it is now necessary to refer to it provides as follows:—

Sec. 1. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, which is not accompanied, etc., shall be registered with the affidavit of the mortgagee, etc.

Sec. 2. Such last mentioned affidavit * * shall state that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that it was executed in good faith and for the express purpose of securing the payment of money justly due, etc., and not for the purpose of protecting, etc.

Sec. 4. In case such mortgage or conveyance and affidavits are not registered, * * the mortgage or conveyance shall be absolutely null and void as against creditors.

Sec. 6. In case of an agreement for future advances, * * the time of repayment thereof not being longer than one year, * * and in case of a mortgage * * for securing the mortgagee repayment of such advances, or in case of a mortgage * * for securing the mortgagee against the endorsement of any bills or promissory notes, or any other liability by him incurred for the mortgagor not extending for a longer period than one year, * * the same shall be *as valid and binding as mortgages mentioned in the preceding sections of this Act.*

The original Statutes, 12 V., c. 74 and 13 & 14 V., c. 62,

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had no clause similar to the 6th section of the Revised Statutes. That section first appeared in 20 V., c. 3.

It became apparent soon after the passage of the two earlier Acts, that there was a large number of mortgages to which the affidavit prescribed to be made was wholly inapplicable. In the classes of cases mentioned in section 6 of cap. 119 of the Revised Statutes, and in many other cases, it was quite obvious that it would be impossible for a mortgagee to make the affidavit. What then was to be the law with reference to such mortgages? Were they, as being included in the opening words of the Statute—"Every mortgage"—to be deemed void, or were they outside the Act altogether, as being cases not present to the mind of the Legislature, and therefore not intended to be affected by its legislation? Clearly the latter was the true construction to be placed upon the Act.

In *Baldwin* v. *Benjamin*, 16 U.C.R. 52, Chief Justice Robinson said, "We could not hold that the Statutes apply to such a case as the present if it is impossible, under the circumstances, that the mortgagee could properly make the affidavit which the latter of these Statutes requires; * * *Lex non cogit ad impossibilia*; and if this be really a mortgage which cannot be registered according to the directions of the Statute, it should follow, that if it be otherwise legal, it cannot be held invalid for want of registration." It being thus apparent, that the original Acts were defective, and that there might still be many mortgages privately given, the Act, 20 V., c. 3, was passed enacting section 6 of R.S.O., cap. 119.

The question now is, have all chattel mortgages to be registered?

There is a cardinal principle for the construction of Statutes which must be borne in mind here. It is formulated by Draper, C. J., in *Kraemer* v. *Glass*, 10 C.P., 475. "Every provision for these purposes is a departure from the Common Law, and so far as is necessary to give these provisions full effect we must hold the Common Law is

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superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full means of relief or benefit the Act was intended to give."

The Statute makes no provision for mortgages for securing endorsements of notes payable at a longer date than one year. It says nothing about such mortgages one way or the other. Is then such a mortgage invalid? It is clearly not invalid under sections 1, 2 and 4 of the present Act, as shewn in *Baldwin* v. *Benjamin* (supra), because these sections do not refer to such a case. Is it then invalid under section 6, which also makes no reference to it? Let it be noted here that such a mortgage would be undoubtedly valid at Common Law, and that section 6 does not declare that any mortgage whatever is to be void, but merely that certain mortgages are to be "valid and binding." The decision in *Baldwin* v. *Benjamin*, shews that without this declaration such mortgages would be "valid and binding." This section merely declares, therefore, a portion of the existing law. There is no Statute declaring the mortgage void, and it is good at Common Law.

There are a number of other cases which shew that if the Chattel Mortgage Act does not in terms apply to the case in hand, the case is outside the Statute altogether, and unaffected by its provisions.

Mathers v. *Lynch*, 28 U.C R. 363. The mortgage was for *future* endorsations. Wilson, J., said:—"If the Statute did not extend to past endorsations, it would follow that mortgages given for such liabilities required no special recital, nor any affidavit by the mortgagee, *nor registration*, to give them effect; not that they would be void."

Walker v. *Niles*, 18 Gr. 210. The mortgagee gave the mortgagor his note and took the mortgage to secure himself against payment. Mowat, V. C.—"If the mortgagee could not truly make the affidavit in such a case it would follow, * * that the case is not within the operation of the Act, and that compliance with any of the provisions

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of the Act was unnecessary in order to the validity of the transaction. See also *Taylor* v. *Ainslie*, 19 C.P., 78.

A somewhat similar point was held in construing the earlier Registry Acts with reference to equitable interests. It was determined that the Act only applied to instruments which could be registered under the Act, and not to equities which sometimes arose irrespective of instruments.

The line of cases just quoted seems to have been entirely overlooked in the cases referred to at the commencement of this article; and it may be, that had they been presented to the Court, they would have been found to be based upon grounds sufficiently strong to have induced the Court to hold that if the term of credit exceeded one year, the mortgage was not within the scope of the Act, or subject to its provisions, and was therefore valid.

JOHN S. EWART.

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DOES A POWER TO SELL IMPLY A POWER TO MORTGAGE?

[*Concluded.*]

The American authorities upon the point appear to be as conflicting as were the early English ones. We have already quoted Chancellor Kent, who says that "the better opinion would seem to be that a power to sell for the purpose of raising money will imply a power to mortgage, which is a conditional sale, and within the object of the power (*q*).

The question was affirmatively answered by the Supreme Court of Pennsylvania (*r*), upon the authority of *Mills* v. *Banks*, as early as 1829, and it has ever since been held in that State as a rule of property, that an absolute and unrestricted power to sell includes a power to mortgage (*s*). The same view was at one time taken in New York (*t*); but this has been over-ruled by a subsequent decision (*u*), in which the English authorities are reviewed. In the latter case it is pointed out that a man may, by a single instrument, be invested with a power coupled with an interest as to one estate, and with a naked power as to another estate in the same land. For example, an instrument might empower a man to sell a term for years, and take the purchase money for his own use, with power to sell the reversion for the benefit of others; the latter would be none the less a naked power because the former vested a title in the donee. *Semble*, that the power, coupled with an interest, would authorize a mortgage, while the bare power would not.

There is one general ground on which the American authorities are distinguishable from the English, which is, that

(*q*) *Kent's* Com., 11th Ed., 161.

(*r*) *Lancaster* v. *Dolan*, 1 Rawle, 231.

(*s*) *Gordon* v. *Preston*, 1 Watts (Pa.) 386.

(*t*) *Williams* v. *Woodard*, 2 Wend. 492.

(*u*) *Bloomer* v. *Waldron*: 3 Hill, 361, See also *Coulant* v. *Servoss*, 3 Barb. 128. The Iowa Courts also hold that there is no implied power to mortgage. *Hubbard* v. *The German Catholic Congregation*, 34 Iowa, 31. But see *Sampson* v. *Williamson*, 6 Texas, 102.

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the American Courts look upon a mortgage, not as a conditional sale, but as a mere lien upon the lands which it covers, the legal fee in which lands never passes out of the mortgagor. An American mortgage is, therefore, not such a compliance with a power to sell that it could be maintained even at common law, and the American cases must be considered with this fact in mind.

In our own Court of Chancery, the late Chancellor Blake expressed his opinion as being against the implied power (*v*), but an opinion upon the point was not necessary for the decision of the case before him. It has been suggested (*w*), in support of the power to mortgage that, "when a trustee for sale becomes also the purchaser, relief in equity is given to the *cestui que trust* on his paying to the trustee the money advanced with interest, thereby treating the transaction as a mortgage under the power for sale." It is submitted that this reasoning falls far short of proving the proposition in support of which it is offered. It is true that, when an ineffectual sale of the kind mentioned has been made, the *cestui que trust* who seeks relief against the trustee can only get it upon the terms indicated in the quotation; but that is because "He who seeks equity must do equity," and not because the Court approves of the transaction. The *cestui que trust* cannot claim the original subject of the trust and, at the same time, make the trustee account for the purchase money, which in the case of a sale to third parties would have then become the subject of the trust, but the rights of the *cestui que trust* are bounded only by the application of the above maxim; in such a case the Court would doubtless saddle the trustee with the costs of all necessary litigation occasioned by his breach of trust, thereby marking their disapproval of his conduct. The insufficiency of the reasoning, however, becomes more apparent when we apply the same maxim to a case where a trustee with power

(*v*) *Nowlan* v. *Logie*, 7 Gr. 90; and see *Edinburgh Life Ass. Co.* v. *Allen*, 18 Gr. 425.

(*w*) 3 *Powell* on Mortgages, with notes by Coventry and Rande, 1033—Note (G) by Coventry.

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of sale has, in manifest breach of trust, made a mortgage to a third party, but the mortgage moneys have been paid over to, and enjoyed by the *cestui que trust*. Before the latter, in such a case, could obtain the aid of a Court of Equity to set aside the mortgage, he would have to do equity by recouping to the mortgagee the money that has been so received, together with interest thereon (*x*). This is an application, as between the *cestui que trust* and third parties, of the same equitable doctrine which is invoked in the argument in support of the power, but it enables us more plainly to see the fallacy involved in the above suggestion, because we can from it pass the more readily to a similar case, where the mortgage moneys have been paid to the trustee, but have not been received by the *cestui que trust*; the latter would probably, in such a case, be entitled at his option to confirm the mortgage, and to call upon the trustee for an account of the moneys; but he would most certainly be entitled to set aside the mortgage security as invalid. It would, therefore, appear that the above suggestion is not an available argument in favor of the implied power to mortgage, as it merely shews that, when a breach of trust has been committed, the *cestui que trust* can obtain relief in equity upon condition only of his doing equity, and we have shown that the relief to which he is entitled is bounded only by the application of the equitable doctrine, and where the doctrine does not apply, then the act of the trustee, done in excess of his power, is followed with all the usual consequences of a breach of trust.

The maxim *Omne majus continet in se minus* is also sometimes quoted in support of the power to mortgage, a maxim, the truth of which as a mathematical principle is indisputable, but which as a proposition of law must not be too much relied upon. It is true that, in many instances, the donee of a power may validly do less than the power enables him to do; for instance, if he be authorized to lease for 21 years, he may ordinarily make a lease for

(*x*) See *Devaynes* v. *Robinson*, 24 Beav. 86.

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14 years (*y*); but it is submitted that he would not be authorised to lease for 14 years if it were manifest, from the instrument creating the power, that it was the intention of the author that the lease should in no event be made for a shorter period than 21 years. So, a power to sell may imply a power to mortgage, but not if a contrary intention appear upon the face of the power. We may say of this, as has been said of another frequently quoted maxim, "the maxim can never be applied until the law is ascertained; and when it is, the maxim is superfluous."

The general result of the cases appears to be, that there is no absolute rule which will invalidate a mortgage made under a power of, or trust for sale, but that such a mortgage will be valid if it appear upon the face of the instrument creating the power, that the author contemplated the raising of money by that means. The presumption, however, is against the power, and the burthen of proof is thrown upon the person maintaining the mortgage. The question thus becomes one of the construction of each particular instrument conferring the power, which construction must be gathered from the whole instrument.

There is, however, one class of cases in which it would appear that the presumption is in favor of the power, that is, when there is an unrestricted power to sell, coupled with an absolute interest on the part of the donee, as in the case of a corporation authorised by its charter to purchase lands, and to sell and dispose of them for its own benefit. In such a case it is submitted that there is an implied power to mortgage (*y*).

A H. MARSH.

(*y*) *Isherwood* v. *Oldknow*, 3 Maule & S. 382.

[NOTE.—We are indebted to Mr. John H. Stewart, the learned Reporter of the New Jersey Court of Chancery, for a reference to the case of *Ferry* v. *Laible*, reported in 31 N. J. Eq. Rep. (4 Stewart), in which the power was denied. In a note to this case, the learned Reporter has collected most of the English and American cases on the point. The case itself was afterwards reversed [32 N. J. Eq. (5 Stewart) 791), but not on the point in question.]

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THE VALUE OF THE HUMAN BODY AND BONES.

One of the absolute rights of every British subject is that of personal security; and lawyers mean by that, the legal and uninterrupted enjoyment of life, limb, body, health and reputation. Any one interfering, either by accident or design, with the enjoyment by another of these rights, inherent by nature in every individual, (unless, indeed, the interference is authorized by the proper power in the State), is liable to make good to the injured party the damages sustained by him. With questions of life and death, of health and reputation, we do not propose to deal; but we desire to glance at some of the very numerous cases which have been decided in England, the United States and Canada, upon the important subject of the pecuniary value of the various portions of a person's body. The value of the human form has been considered in many ways and by many people; not only in its dead state by medical students, in its captive state by slave dealers, but also in its living, free, independent state—and that piecemeal—by jurors unimpeachable, and Judges learned and venerable, who have viewed it as a corpse and as a captive as well.

To begin with what the Sunday-school boy said was the chief end of man—the *head*. No jury, we believe, has yet been called upon to value the whole head of a living man; and with accidents fatal in their effects, we have nothing to do here. But different parts of the head—inside and out—have been appraised by intelligent jurors. In Maine, a man who could say with Hudibras,

> My head's not made of brass,
> As Friar Bacon's noddle was;
> Nor (like the Indian's skull) so tough,
> That authors say, 'twas musket proof;

had the external table of his *skull* cracked by an iron poker, wherewith he had been assaulted by a brakesman, and in consequence of the injury he was threatened with palsy of the optic nerve. He sued the railway company for the wrong inflicted by their servant, and recovered $4,000

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damages; and although the company considered the amount excessive, the Court did not. (*Hanson* v. *European, etc., Ry.* 62 Me. 84). But $1,700 was held too much to pay for striking a woman's head with a hatchet; she having been very provoking, and not being much hurt. (*Hennies* v. *Vogel*, 87 Ill. 242). When, on a steamboat, a person received an injury, *resulting* in the temporary loss of the sight of one *eye*, and the jury calculated the damage at $5,000, the Judges held the amount excessive, and ordered a new trial on that account. (*Tenney* v. *New Jersey Steamboat Co.*, (5 Lans. (N. Y.) 507). The jury, although not the Judges, evidently considered this one of

> Those eyes, whose light seem'd rather given,
> To be ador'd than to adore—
> Such eyes as may have look'd from Heaven,
> But ne'er were raised to it before.

A little boy was kicked by a horse, and his eye, skull and brain were so severely hurt that the witnesses at the trial considered he would never be able to obtain a living in an ordinary way. The jury granted him £150, as a slight compensation; and although the child died nine days after the verdict, yet the Court would not grant a new trial asked for on the ground of excessive damages. (*Kramer* v. *Waymark*, (L. R. 1 Ex. 241).

Ho Ah Kow sued the Sheriff of San Francisco for $10,000 damages for cutting off his *queue*. Ho had been fined for keeping a boarding house in a manner contrary to the city by-laws, and in default he had been imprisoned in the County jail for five days; while in durance vile his head was shorn. The loss of his queue, he alleged in his pleadings, was a mark of disgrace and attended with misfortune and suffering, and ostracised him from associating with his fellow heavenlies here on earth. The defendant set up as a justification an ordinance of the City, authorizing the cutting off of prisoners' hair. Kow demurred; and the Judges were with him on the law, considering that such a rule was contrary to the celebrated Fourteenth amendment of the Federal Constitution. (*Ho Ah Kow* v. *Keman*, 20 A.L.J.

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250). What the jury said as to the value of the pig-tail, or if they have ever said anything, we do not know.

A Judge and jurors attempted to estimate the worth of a man's *brains* in a late case. They calculated the value of that part of the brain that was injured, (whether the bump of philoprogenitiveness, veneration or self-esteem, the reporter saith not, but we think it was the first named,) at $10,000. Roy was sitting in a Pullman car, and the upper berth fell once and again, the second time striking him on the head, injuring his brain, incapacitating him from the performance of his usual avocations, and necessitating medical treatment. The Court held the railway company liable, but granted a new trial solely on the ground that the number and ages of the man's children had been given in evidence, apparently to influence the verdict of the jury. (*Pa. R'way. Co.* v. *Roy*, 22 A.L.J. 510).

It is a serious matter to touch a person's *face* unless "Barkis is willing." Mitchell, a very rich man, spat on the *cheek* of Mr. Alcorn in a public place; and for thus using the human face divine as a spittoon, a jury of his fellow citizens mulcted Mitchell in the sum of $1,000. He thought the amount excessive, but the Court did not assist him in getting a reduction. (*Alcorn* v. *Mitchell*, 63 Ill. 553.)

Kissing, too, is a very expensive way of touching the countenance of an unwilling fair one. A conductor on the Chicago and North Western Railway, saluted on the cheeks, Miss Cracker, a passenger on his train. The consequences were—not matrimony, but—a fine of $25 for an assault, the dismissal of the gay Lothario by the company, and a verdict of $1,000 against the company at the suit of Miss C. The Court did not consider the verdict excessive, as it is a carrier's duty to protect his passengers against all the world. (*Cracker* v. *C. & N. W. Ry.*, 36 Wis. 657).

Some twenty years ago, in England, a little boy—aged five years, and named Cox—while playing on the highway, was, like the youngster before mentioned, kicked in the *face* by a horse that was there depasturing; he was badly

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hurt. The jury awarded him £20 for damages to his visage, but the Court would not let him keep it, as they failed to see that the owner of the horse had been guilty of any negligence in allowing his equine to be at large. (*Cox* v. *Burbridge*, 13 C B., N.S. 430 .

In fact a man's head is at least, judging from the views taken of it by some jurors, a very precious part of the body, and indeed everything connected with it becomes valuable. An individual once had to pay £500 for the slight amusement of knocking off another man's hat. He asked in vain for a new trial, *i.e.*, of his case. (5 Taunt, 443).

Now to leave the head and come to the trunk and its more humble members. Many years ago Mrs. Elizabeth Dudley was riding on the outside of a coach in England. The coachee, before driving under an archway into the stable-yard of an inn, asked his passengers to alight; Mrs. D. was dainty and unwilling to soil her boots, and so preferred being driven into the yard. The coach was eight feet nine inches high, and the arch nine feet nine inches. The consequence was that Mrs. Dudley was severely and permanently injured about the *shoulders and back*; (the Divine Sarah might have escaped). An action for damages, and £100 verdict the result. (*Dudley* v. *Smith*, 1 Camp. 167).

One Grieve was standing on a wharf, at Brockville, as the steamer Niagara was leaving, to plough her way along the St. Lawrence. The boat's fender caught in the wharf, broke, and hit G. on the shoulder and so hurt him that he lost the use of his *arm*. He recovered a verdict for £387, 10s.; but the Court thought he had been guilty of contributory negligence and so allowed him to continue to grieve, and ordered a new trial, on payment of costs. (*Grieve* v. *Ont. St. Co.*, 4 C. P. 387).

An injury to the *vertebræ* of the spine of a lady, married, had to be paid for by £500. Mr. and Mrs. Foy were travelling by rail; at the station where they stopped there was not room for all the cars to draw up to the platform, and some of the passengers, the Foys among the rest,

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were asked to get out upon the line. Mrs. F., with the aid of Mr. F., jumped from the top step of the car to the ground, a distance of three feet, and came down very heavily, jarring her vertebræ and injuring her spine. An English jury gave her the sum mentioned, and the Judges declined to interfere. (*Foy* v. *L. B. & S. C. Ry.*, 18 C. B., N. S. 225).

In Wisconsin, $2,750 was given for the fracture of one of the spinal vertebræ and the dislocation of the hip-joint; and the Court did not consider the sum exorbitant. (*Houfe* v. *Fulton*, 34 Wis. 408). Nor did the Court in Illinois think $7,500 too much for a healthy young woman who, through a defect in a side-walk, fell and fractured her lower vertebræ, so that paralysis ensued. (*Chicago* v. *Herz*, 87 Ill. 541).

Mrs. Toms and her son and heir were driving in a buggy over a bridge on which some new planks had been placed. The nag shied at these, and backed up against the railing which broke; the hind wheels went over the bank, and the occupants of the buggy were thrown into the water below. Mrs. Toms' *spine* was injured, and even when before the jury she had not recovered her strength. The first verdict was $750 for herself and $50 for her husband, for his consequential damages. Unfortunately she had insisted upon swearing at the trial, and the Court considered that so improper that they set the verdict aside. (*Toms* v. *Whitby*, 32 U.C.R. 24). Another trial was had, and the jury magnanimously gave $2,500 to the suffering lady and $250 for Mr. Toms. Again the Court interfered, thinking the damages very large, and ordered a third trial unless the Tomses would be content to take $1,250 between them; this they wisely agreed to do, (35 U.C.R. 195) and the Court of Appeal, to which the defendants went, would not take that sum away from them. (37 U.C.R. 100).

A school teacher was allowed to keep $8,958 given for a permanent injury to her spine. (*Ill. C. R.* v. *Parks*, 88 Ill. 373).

Arms, both male and female, have been valued. The case

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just about to be cited must not be taken as a ground for arguing that a lady's arm is worth more than a similar lateral appendage owned by a gentleman. A Miss or Mrs. Sweely (we are not sure which, but judging from her influence on the jurors, we fancy she must have been married), was walking in the town of Ottawa and was severely injured through a defect in the sidewalk. Her arm was hurt so that the muscles gradually wasted away until she completely lost its use, and the wearing away was accompanied by constant pain. She sued the town, and the jury rendered a verdict in her favor of $3,200, and this the Court considered not excessive. (*Ottawa* v. *Sweely*, 65 Ill. 434).

Another woman, through a railway accident, lost one arm and the use of the other, and was withal so bruised, battered, blackened and injured, that she was in constant pain, and suffered from impaired health and memory; she sued the company for damages. The jury at first took a moderate view and gave her $10,000; the company cried, "Pshaw! that's too much," and the Court, thinking it exorbitant, directed a new trial. The second jury awarded $18,000; the company and the Court thought as before, and a third trial was ordered. The jury took the bit in their mouths and assessed the injuries of the damaged lady at $22,500. The company, more dissatisfied than ever, again appealed to the Court, but the Judges (doubtless impressed with the more than sybilline character of the proceedings), declined to interfere, and allowed the suffering—but persistent — woman to keep the money. (*Shaw* v. *Boston & W. Ry.*, 8 Gray 45).

Mr. Drysdale was (perhaps is) a clergyman, enjoying a salary of $1,400; while travelling on a half-fare ticket (one of the numerous little perquisites of the cloth) he tried to shut a window in the car, and his arm was broken by the standard of a lumber car standing upon a side track. He was detained from his duties for eight weeks (whether either he or his people lost anything by this does not appear), and suffered great pain from time to time for eight months (perchance his flock suffered similarly on Sundays, only longer).

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He sued the railway company and recovered a verdict for $3,000. The company considered, and we think rightly, that this was too large a sum to be compelled to pay for breaking a part of a parson and applied to the Court to set aside the verdict. The Court, however, deemed the figure not so exorbitant as to justify a reversal. This was in Georgia where ministers may be scarce; nearer home, we fancy, they are not so highly prized. (*Western, etc., Ry.* v. *Drysdale*, 51 Ga., 646).

Query—Do ladies serve on juries in Georgia as they do in Montana (we believe)? If so, and Mr. D. was unmarried, young and good looking, we understand the verdict.

We are not left entirely in the dark as to the value of a Canadian's arm. One Watson, in 1864, was journeying on the Northern Railway, and went into the express car, where he should not have gone, but the conductor who saw him there did not tell him to leave. There was a collision, and W.'s arm, the right one, was broken; no one in the passenger cars was seriously hurt. The injured man was in the house four and a half weeks and attended by two doctors; he suffered a good deal, kept the arm in a sling for some time, and then found it smaller than the other and scarcely fit to use. The jury gave $2,000. The Court said that the company might have a new trial upon payment of costs as they were not quite satisfied as to the extent of the plaintiff's injuries; and to the Chief Justice the damages appeared extremely large. (*Watson* v. *N. R. Co.*, 24 U. C. R., 98).

Coming down still lower we find what some people think should be paid for a broken *wrist*. Mrs. Jones was a nurse, and through a broken board in the sidewalk she stumbled and fell and fractured her right arm at the wrist, and for this the metropolis of the Prairies had to pay her $1,000. (*Chicago* v. *Jones*, 66 Ill. 349.) In Kansas, the Court decided that $5,000 was an excessive amount for the railway company to be compelled to pay for an injury causing a deformity of the *right hand*. (*Union, etc., Ry. Co.* v. *Hand*, 7 Kans. 380).

Fingers even have been valued. Fordham was getting

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into an English railway carriage. The door being at the side and opening outwards and having a parcel in his right hand, he placed his left on the door plate, to assist him in entering. The guard without any previous warning, flung to the door and badly crushed F.'s fingers. Both the Court of Common Pleas and the Exchequer Chamber thought that the guard had been careless and that Fordham had done nothing amiss, and so they let him keep the damages given by the jury against the railway company, £25. (*Fordham* v. *L. B. & S. C. Ry. L. R.*, 3 C. P. 368; 4 C. P. 619, Ex. Ch.) A servant and apprentice of one Hodsell, a goldsmith, was bitten by Stallebras' dog, two of the fingers, the right hand and the right arm being badly lacerated. Hodsell sued for the loss of the services of his apprentice, a lad of seventeen, and recovered £30, one-third for past loss and the balance for future loss. (*Hodsell* v. *Stallebras*, 11 A. & E., 301). Some boys were coming home from school and in passing a machine which stood unguarded beside the road, a child of seven years induced another of four, to place his fingers within the machine, while another boy by turning a handle set it motion; the fingers were badly crushed and had to be amputated. The jury gave £10 damages for them, but the Court considered that the owner of the machine was not liable. (*Mangan* v. *Atterton*, L. R., 1 Ex. 239).

One Jackson was riding in the underground railway from Moorgate Street to Westbourne Park, the car was full, yet at the stations, others tried to enter, which those already within sought to prevent; the door being open as the car was about to pass into a tunnel, the porter slammed it to, and jammed Jackson's *thumb* in the hinge. The jury gave him £50 to salve his injuries. The Judges of the Court of Common Pleas and of Appeal said "Let him keep the money"; but when the company went before the House of Lords, that august assemblage said, "He cannot have the money, as the porter was not guilty of negligence." (*Jackson* v. *Metropolitan Ry.*, L. R., 10 C. P., 49; 2 C. P. D. 125; 3 App. Ca. 193). Another passenger had a thumb squeezed in a very similar way by the porter shutting the carriage

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door upon it; and the jury estimated his injury at £20. The Court thought that the evidence showed that the passenger and not the porter had been negligent. (*Richardson* v. *Metropolitan, Ry.*, 37 L. J., C. P. 300). Still another thumb was appraised in a later case. A man was getting into a car, but before he had taken his seat the servants of the company shut the door without warning; the man's thumb was squeezed by the hinge, and in an action for damages, the jury, following the example set by the last, awarded £20 for the injury, but the Court considered that there was no evidence of negligence on the part of the company's servants and so set the verdict aside. (*Maddox* v. *L. C. & D., Ry.*, 38 L. T., 458.) Fortunately on our Canadian cars, thumbs are not in such danger.

[*To be Concluded.*)

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EDITORIAL REVIEW.

A Proposition for Law Schools in Ontario.

Many regrets have been expressed and many more felt, at the abolition of the Law School. The writer can speak from personal experience of the benefits that the lectures afforded to students. The regular examinations became comparatively easy to a constant attendant, while the Law School examinations afforded a more generous test of the student's capacity than the regular examinations can ever do. The moot courts wherein were debated questions founded upon, or evolved from, the lectures furnished the only school in which forensic speaking could be practised. It may be said of the Law Society of Upper Canada, that at the present time, though requiring the student to undergo the test of periodical examinations, it affords no means whatever of educating him, beyond offering access to the Library during hours which make the privilege practically useless.

The want of a Law School, or of some educational agent, was felt at its inception. Its usefulness to the students during its progress could not be denied. The fact that the late Law School and the former system of Term Lectures produced from among the staff of lecturers some of the ablest members of the profession, is a fact that alone bears testimony to the benefit that accrued from them. The usefulness of the Law School was found to be gone when the crime of "centralization" was laid in swaddling clothes at its door; and the Law School followed its usefulness. As long as the Universe exists it will have a centre; and as long as the worlds swing around the centres of their systems, so long will there be forces acting and counteracting upon them. Unless we can separate ourselves from the Universe we must follow its laws; and if we can arrange our acting and counteracting forces so that the centrifugal and centripetal motions shall exactly counterbalance each other, we shall swing through our days as harmoniously as the rest of the Universe.

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When our distant brethren complain that the Law School attracted their best students to Toronto, and, as if this were not enough, that their fees paid into the exchequer of the Law Society were being used to produce this very effect, they show a cause which is not devoid of justice. There are several answers to this, none of which, however, are satisfactory to them. It is no comfort to them to know that all classes suffer, to a certain degree, from the influx of young men to the cities, and particularly to a Capital. It is no satisfaction to them to be told that the same objections which are applied to a central Law School will apply to a central University. But it should be a satisfaction to *some one* to know that students were receiving a higher education, and that better lawyers were growing up by reason of such a school. Perhaps to ask those who were practically losers by it to smile with satisfaction at the result, would be to pay too great a compliment to weak human nature.

What we have to do is not to persuade one another that actual forces do not exist, but our duty is to recognize the existence of the forces as they are, and to endeavor to make them balance. Now if we may express our opinion upon the question, we would say that the blow struck at legal education by the abolition of the Law School, was not worthy of the profession. It was a retrograde movement, theoretically and practically. If the sense of the students of Toronto were taken upon it, we believe that they would uphold us in what we say. They have built upon the ashes of the Law School a society which, besides being practically useful to themselves, is making its influence felt in the profession and with the Benchers. The chief bond of union of the members seems to be a sincere desire of improvement in reading, speaking and debate; though the personal influence and popularity of the indefatigable President has accomplished a great deal. At the beginning of the winter, a course of lectures was suggested, and with the assistance of volunteers it was finally established; and it is gratifying to see that the

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efforts of the lecturers have been fully appreciated, and that there exists among the members a real thirst for knowledge. We judge of this from the large attendance, the assiduity with which notes are taken, and the intelligent questions which are asked during the lectures. The Society has received encouragement from the recognition of the Benchers, who have offered prizes to the students passing the best examinations upon the subjects of the lectures. The Judges and leading members of the Bar are asked to preside at the public debates, and in doing so have expressed an interest in the Society.

But it must be remembered that the tax upon the time of the lecturers is a great one. And it cannot be expected that they can continue to devote their time and attention to a voluntary work, when their attention is often demanded and due elsewhere. The students, therefore, have not the advantage that they would derive from a responsible staff of paid lecturers.

It has been shown that the Law Society cannot provide a staff of lecturers without offence to those residing and practising out of Toronto. But we think they are not altogether powerless. There was no such great evil inherent in the late Law School as made it deserve destruction. The evil to contend against was the draft of students from the "country." If a system can be established which will afford instruction to the students without bringing loss or discomfort to their principals, we shall have succeeded in bringing about a balance of the forces. To effect this we suggest that a school shall be established after the manner of a University, having its examiners at Toronto, and its quasi-colleges planted wherever there is a large enough number of students to form one. We may illustrate our meaning thus :—For the sake of example let us take Toronto, London, Hamilton, Kingston and Ottawa, as the places at which schools should be established. In each school let there be three lecturers. "College examinations" might take place in each school, under the supervision of the lecturers. But all Law Society examinations should

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take place in Toronto, under the supervision of examiners appointed for that purpose. The first question is one of expense. Compared with the expense of the late Law School the expense of this system would not be great. We may suppose, for example's sake, that a sum of $250 should be paid by the Law Society to each lecturer, for his course of lectures, and that the course should extend over six months in the year. This would amount to $750 for each school, or $3,750 per annum for the whole system. The cost of the Law School was $8,400 per annum, viz., $1,000 to the President and $300 each to three additional lecturers. The subsidy to the proposed lecturers might be supplemented by a small fee for the course, to be paid by each student, which would not weigh heavily upon them, while it would be a tangible increase to the lecturers' fees. If such a system were established and in good working order, more frequent examinations might be held, to test the rate of improvement of the students; but this is matter of detail, and subservient to the general principle of the scheme.

At present we offer no advocacy of the scheme, but that which it may bear upon its surface; but we shall have occasion to recur to it again.

While upon the subject, we might mention that there exist in England now, classes and courses of lectures, under the management of the Incorporated Law Society and the Council of Legal Education. In the elementary law classes, the fees for attendance range from about $16 to about $37. There is no necessity, however, to make the fees, under our proposed system, as large as these. We hope that our proposition may be discussed at least, if n thing more comes of it; but we should be glad to see it taken up by the Benchers.

Before closing we wish to refer to the efforts that are being made by the University of Queen's College, to supply the wants of law students. A regular course of instruction is provided, for which the students in attendance pay a small fee. The lecturers are B. M. Britton, Q.C., R. T. Walkem, Q.C., R. Vashon Rogers, G. M. Macdonnell, J. McIntyre and J. M. Machar.

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The Middlesex Law Association.

We are in receipt of a printed letter from Messrs. E. J. Parke and Albert Jeffery, Chairman and Secretary respectively of the committee appointed by the Middlesex Law Association for the consideration of the proposed Judicature Bill, together with a report of the Committee. The letter recommends, (1) The desirability of referring to a commission of skilled jurists the consideration of a Bill so important to the profession. (2) The abolition of the remaining distinctions between the Courts of Law and Equity, even in the names of the Courts. (3) The decentralization of the business of the Courts, by establishing permanent divisions of the proposed High Court in different districts of the Province, with a Court of Appeal at Toronto. (4) A practice which shall include all forms of actions, and under which *actions shall be conducted*, as far as possible, from their commencement to their termination, *in the locality in which the litigation shall arise.*

With the first clause of the report we are sure every one must heartily concur. A great change such as that proposed should not be made in a closet. Suggestions from individual members of the profession do not carry the same weight as would the resolution of the Bar of a City or County, or the report of a commission appointed to consider the measure. Private letters or suggestions are easily met and disposed of by the framer of a Bill who has formed a preconceived notion of the efficacy of his measure; while the same suggestions coming from a large body or a commission would be irresistible.

The second resolution is the logical result of the proposed Bill though the Bill is not logical enough to embody it in its enactments. Either retain the present composition and names of the Courts and let them be co-ordinate parts of the High Court, or abolish the names and distinctions *in toto*, and let the Judges meet for the transaction of business in divisions without any distinctive appellations.

The third resolution does not so readily commend itself.

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We are aware that any one speaking from Toronto is liable to be accused of basing his opinion to a certain extent upon self-interest. But we shall find few so hardy as to deny that, as a general rule, decentralization means weakness, while concentration is indicative of strength. The usual concomitants of a permanent Court must follow the suggested distribution of the Courts, and taxation must be increased to erect and maintain suitable buildings and offices and to maintain a library, a complete staff of officers for the transaction of routine business, and a staff of reporters for each Court.

A large measure of decentralization has already been accomplished by the proposed Bill, by which nearly all routine business is to be hereafter transacted by the county Judges. It is to the present necessity for the transaction of this business at Toronto that we understand objections have been made, and that not unjustly.

However, our learned friends have the right to be heard, and if the greatest good can thus be done to the greatest number they should succeed. But the *onus* is on them to show it.

The Coming Election of Benchers.

In a few weeks the Bar of Ontario will be called upon to elect Benchers for the ensuing five years. We hear rumours of canvassing, which we hope will be blown away by the good sense and good taste of a learned profession. A learned body should be composed of individuals of sufficiently independent minds to choose for themselves, from a number of well-known and eminent men, thirty who are entitled by reason of their talents, rank and business qualifications, to the suffrages of their professional brothers. It is well, however, to bear in mind that the position of a Bencher is not entirely an honorary one, and his duties are not fully discharged by discussing luncheons during Term. The business of the Law Society requires constant attention and is transacted by a comparatively small proportion of the Benchers. The working committees will

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be found to be composed of a limited number of men upon whom the burden of the work falls. These gentlemen deserve the thanks of the profession at least, if they have not established their claims to re-election by the faithful discharge of their duties.

American Forensic Oratory.

The Statutes of Limitations are as a rule dry reading, and arguments founded upon them are apt to be tedious. But see how Counsel embellishes an argument in a case in error upon the effect of those statutes as applied to public bodies:—"Therefore plaintiff says that there is no legal "medicine that can cure their defective title, and no balm in "Gilead that can purge to a pure and pristine health the "foul inception of their pernicious claim." *Callaway County* v. *Nolley*, 31 Missouri.

The Canada Law Journal.

Our contemporary, in entering upon a new series, announces to the Profession that it has, in the twenty-seventh year of its existence, obtained a new lease of life. We offer our congratulations and hope that the new lease is a renewable one, and that the JOURNAL may long continue to be as useful as it has always been.

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RECENT DECISIONS.

Campbell v. *Victoria Mutual Insurance Company.* C. L. T. Occasional Notes, p. 50.—This case is worthy of note for the diversity of opinion expressed in it. The key-note of the judgment of the Court is given by Mr. Justice Cameron, who construes the question, "Is there reason to fear incendiarism?' as "Have you reason to fear, or do you fear incendiarism?" There is undoubtedly a great difference between the questions when the dry construction of the words themselves is placed upon them. It is only by departing from the strict words of the contract, and looking at the evidence of the intention of the Company in asking the question, that the construction given these words can be arrived at. Should we endeavour to ascertain the intention of the contracting parties from the words of their contract, or should we ascertain their intention from extrinsic sources, and then test the contract by the touchstone of the already ascertained intention of one of them? It is manifest that, if the question as it stands in the contract had been put to a jury, they would have been justified in answering it in the negative. And it is just as plain that, if they had been asked the question as it is construed, they would have answered it in the affirmative. It is quite plain after hearing the evidence, what the Company intended to ask; but it is just as plain that they failed to express themselves properly in the question. We might illustrate the distinction further, by supposing the questions to be put to a witness under examination. First might be put the general question, "Is there any reason to fear incendiarism?" Then, having laid the foundation, follows the particular one, "Do *you* fear incendiarism?" The answer to the one would not necessarily be the answer to the other. And if not, then the questions are not interchangeable. Without saying that this question was put with intent to mislead, who shall say that artful and misleading questions may not be put, whose meaning is to be ascer-

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tained only by reference to the evidence after the mischief is done.

A word or two as to the dissenting judgment. Admitting that the word "incendiarism" applies to buildings only, it seems to us that it may nevertheless be properly used in an application for insurance upon personal property. True, if the questions were asked with special reference to chattels, such as grain, farm implements etc., or, we might add, plate and china, which are not inflammable, it would be insensible. But the word in its ordinary acceptation refers to buildings only, and the question has not been limited to chattels here; therefore the word receives its ordinary meaning, and the question must have been asked with reference to buildings. Now men insure their chattels, not because they are inflammable, but because they are kept in buildings which are inflammable. The barn, then, being confessedly inflammable and the chattels being in it (or about to be put into it), the question is asked, "Do you fear incendiarism?" which may be paraphrased thus:—"Do you fear that the buildings in which your chattels are kept will be set on fire?' If our reasoning be correct the question seems to have been well put.

OSGOODE LITERARY AND LEGAL SOCIETY.

The members having returned from their Christmas vacation, there was a well attended meeting on Saturday evening, the 15th of January. Previous to the meeting, Mr. C. R. W. Biggar continued his lectures on "Mortgages."

The President took the chair, when it was moved by Mr. C. P. Wilson, seconded by Mr. Munson, and carried unanimously, "That the Osgoode Literary and Legal Society has learned with the deepest regret the irreparable loss which has recently been sustained by the whole community in the death of the late Chief Justice Moss, who throughout an all too short career, alike in his relations with the students, the Bar, and the Bench, ever commanded admiration for his great abilities, and affection for his genial and engaging

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disposition. This Society feels that in him the students and younger members of the Bar have lost one who as lecturer, barrister and judge was ever mindful of their interests and a sympathizer with their efforts."

A debate on the subject, "Resolved, That the occupation of India by the British has been disadvantageous to the nation," was then opened by Mr. Gillmor, supported by Messrs. Gould and Flint.

The speakers gave a rapid sketch of the history of India, which had advanced to a high standard in literature, art and education, long before the western nations had passed from their infancy. They contended that the East India Company had ground down the natives for gold, that the Indians regarded the name of Englishman as synonymous with vice and degradation, owing to the vicious habits of the ruling classes, and that the country had not been in any way improved by English rule.

Mr. Pearce spoke on the negative, and, having spent over four years in India, gave an interesting account of the country as it is now. He showed that the cruelties and barbarities of the Suttee and Juggernaut had been put down, and schools opened throughout the country, which were free to all; that many of the Magistrates were now educated and enlightened natives, that the people generally were satisfied with the English rule; that the malcontents were those who had been deposed by us from positions in which they had been in the habit of enriching themselves at the expense of their fellow men.

After reviewing the arguments, the President gave a divided decision, agreeing with the affirmative as to the period when the country was under the rule of the East India Company, and with the negative as to the subsequent period under the rule of the British Government.

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DIGEST OF SELECTED CASES.

ON

CRIMINAL LAW.

BAIL.

When Refused.—When the Grand Jury has found a true bill for murder, bail will generally be refused. In this case there was evidence, if believed, sufficient to warrant a conviction, and only one Assize had elapsed without a trial. An application to admit to bail was refused, and the prisoners left to their remedy under the Habeas Corpus Act. Remarks as to the considerations which should govern the exercise of discretion in granting or refusing bail. *Reg.* v. *Heeler et al.*, 7 P. R. 117.

BIGAMY.

Indictment.—An indictment for bigamy, in the form prescribed by State, is sufficient. The indictment alleged that defendant "unlawfully married one Susie E. Roe, whose true name was and is Susan E. Meller." The omission to prove the latter part of the averment, where the proofs showed a marriage with a person known among his acquaintances by the name of Susie E. Roe, and also assumed that name at the time of such marriage. *Held*, insufficient as a ground for dismissing the action. *State* v. *Armington*. 25 Minn. 29. [See *Rex* v. *Allison*, R. & R. 109; *Rex* v. *Edwards*, R. & R. 283; *Rex* v. *Penson*, 5 C. & P. 412.

CHARACTER.

General Principles.—It is proper to instruct the jury that, in passing on the guilt or innocence of the prisoner, proof of good character constitutes an ingredient to be considered by them without regard to the character of other evidence, and that its weight is to be determined by them. *State* v. *Gustafson*, 50 Iowa 194.

An instruction, directing the jury that previous good character would not constitute a defence as "against facts positively or strongly proved," *Held*, to be erroneous. *State* v. *Lindley*, 51 Iowa 343.

When evidence has been given by a defendant, tending to establish his good character, he is entitled to have the jury instructed as to its effect. *State* v. *Swain*, 68 Mo. 605.

COINING.

Evidence.—Evidence of a fraudulent sale of counterfeit coin will support an indictment for fraudulent possession of such coin. U. S. Cir. Ct. (Mo.) *United States* v. *Biebusch*, 1 Fed. Rep. 213.

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CONCEALMENT OF BIRTH.

Evidence.—On an indictment for endeavouring to conceal the birth of a child "by a secret disposition of the dead body of said child," the evidence for the prosecution having failed to prove the death of the child, the conviction was quashed. *Reg.* v. *Bell*, 8 Irish R., C. L. 541.

On an indictment for concealing the birth of a child, it appeared that the prisoner, who lived alone, had placed the dead body of the child, behind a trunk in the room she occupied, between the trunk and the wall. On being charged with having had a child, she denied it, saying she was suffering from cramps, and it was only after the doctor, who was called in, had informed her that he knew that she had been delivered of a child, and on being pressed by one of the women present, that she pointed out where the body was, and the woman went and got it. Until so pointed out the body could not be seen by any one in the room. *Held*, that the evidence more fully set out in the report was sufficient to go to the jury; and the County Court Judge, before whom the prisoner was tried by her consent without a jury, having found her guilty, the Court refused to interfere. *Reg.* v. *Piche*, 30 C. P. 409.

CONSPIRACY.

Evidence.—Upon an indictment for conspiracy to procure by fraud the return of one Fellowes as a member of the Legislative Assembly: *Held*, that it was clearly unnecessary to prove that all the defendants, or any two or them, actually met together and concerted the proceeding carried out; it was sufficient, if the jury was satisfied from their conduct and from all the circumstances, that they were acting in concert. *Reg.* v. *Fellowes*, 19 U. C. R. 48.

Demurrer.—An indictment under the U. S. Rev. Stat., section 5440, which makes the conspiring of two or more persons to defraud the Government, a punishable offence, is good on demurrer as against the objection that, while the offence charged is a conspiracy by two or more persons, the indictment is against one only. *United States* v. *Miller*, 3 Hughes 553.

CONSTABLES.

Indictment.—An indictment for refusing to aid a constable in the execution of his duty, and to prevent an assault being made upon him by persons in his custody with intent to resist their lawful apprehension, need not show that the apprehension was lawful, nor aver that the refusal was on the same day and year as the assault, or that the assault which the defendant refused to prevent, was the same as that which the prisoners made upon the constable; neither is it any objection that the assault is alleged to have been made with intent to resist their lawful apprehension by persons already in custody. *Reg.* v. *Sherlock*, L. R. 1, C. C. 20.

DYING DECLARATIONS.

Admissibility of.—Dying declarations should be excluded only when they show upon their face that they are mere opinion, and when admitted

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their credibility is to be determined by the jury, in view of all the circumstances under which they are made. *State* v. *Clemons*, 51 Iowa 274.

EMBEZZLEMENT.

Description of Property.—An indictment for embezzlement described the property embezzled as "certain United States five-twenty government bonds, which were valuable securities of the value of $5,000." *Held*, a sufficiently particular description. *State* v. *Meyers*, 68 Mo. 266.

Jurisdiction.—A clerk, whose duty it was to remit at once to his employers in Middlesex all moneys collected by him as their clerk, collected at York, on the 18th of April, a sum of money as such clerk; but never remitted any portion of it. On the 19th and 20th of April he wrote and posted from places in Yorkshire, to his employers in Middlesex, letters making no mention of the money so collected, and on the 21st of April he wrote and posted at Doncaster, in Yorkshire, to his employers in Middlesex, a letter which was intended to make them believe that he had not then in fact collected the money in question. These letters were duly received by the employers in Middlesex. *Held*, that the receipt of the letter of the 21st of April in Middlesex, was sufficient to give jurisdiction to try the prisoner in Middlesex. *Reg.* v. *Rogers*, L. R. 3, Q. B. D. 28.

FALSE PRETENCES.

What amounts to.—The crime of obtaining goods by false pretences is complete, although at the time when the prisoner made the pretence and obtained the goods, he intended to pay for them when it should be in his power to do so. *Reg.* v. *Naylor*, L. R. 1, C. C. 4.

On an indictment for obtaining money under false pretences, it was proved that the prisoner, a travelling hawker, represented to the prosecutor's wife that he was a tea-dealer from *Leicester*, and induced her to buy certain packages which he stated to contain good tea, but three fourths of the contents of which was not tea at all, but a mixture of substances unfit to drink and deleterious to the health. The jury found that the prisoner knew the real nature of the contents of the packages, that it was not tea, but a mixture of articles unfit for drink, and that he designedly and falsely pretended that it was good tea with intent to defraud; and the prisoner was convicted. *Held* that the conviction was right. *Reg.* v. *Foster*, L. R. 2, Q. B. D. 301.

FORGERY.

What constitutes.—"Mr. W. please let the bearer, W. T. have the amount of £10 and you will oblige me.—B. B. Mitchell": *Held*, to be the forgery of an order for the payment of money and not a mere request. *Reg.* v. *Tuke*, 17 U. C. R., 296.

Alteration by the payee of a note, of a memorandum of payment indorsed on the back thereof by himself, not signed, is not a forgery for which he is liable to indictment. *State* v. *Davis*, 5 N. W. Rep., 149.

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LARCENY.

Recent possession.—On the trial for theft of a yearling, the prosecution proved the ownership as alleged, the disappearance of the animal from its accustomed range, and the defendant's unauthorized possession and sale of it *within four weeks* after its disappearance from its range. The defence asked the Court to charge that it must be shown that the possession was recent, before they could consider it an inculpatory fact. *Held*, that such instruction was properly refused, being neither abstractly correct nor pertinent to the evidence. *Gose* v. *State*, 6 Tex. App. 121.

LIBEL.

Province of Magistrate.—Upon an information for maliciously publishing a defamatory libel under the 5th section of 6 & 7 Vict., cap. 96, the magistrate has no jurisdiction to receive evidence of the truth of the libel, inasmuch as his function is merely to determine whether there is such a case against the accused as ought to be sent for trial, and a defence based upon the truth of the libel under section 6 of the Act, can only be inquired into at the trial, upon a special plea framed in accordance with the terms of that section.

The province of a magistrate, upon a preliminary inquiry into a charge of an indictable offence discussed. *Reg.* v. *Carden*, L. R. 5, Q. B. D. 1.

MURDER.

Conduct of the Accused.—The conduct of the accused, when brought before the body of the deceased after it had been disinterred for identification, is admissible in evidence against him, although he was under arrest at the time. *Texas Ct. of App.—Handline* v. *State*, 3 Tex. L. J. 101.

PERJURY.

Requisites of Indictment.—An indictment under Maine Rev. Stat., chap. 112, sec. 2, making it a crime to endeavour to incite another to commit perjury, which alleges that the act of perjury was to be committed in a suit designed to be brought, but which was not pending at the time of the finding of the indictment, and never had been pending, is bad; but if the attempt alleged had been to get another to commit perjury, by going before a Magistrate or Grand Jury, for the purpose of inaugurating a criminal proceeding by false swearing, the rule would be different. *State* v. *Joaquin*, 69 Me. 218.

An indictment for perjury must show that the oath assigned as perjury was administered by competent authority. *Tex. Ct. of App.—Stewart* v. *State*, 3 Tex. L. J. 76.

PLEADING.

General.—Whether a knife or a brickbat is a deadly weapon, is not a question of law, to be determined on demurrer to an indictment, but a question of fact for the ury. *State* v. *Harper*, 69 Mo., 425.

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RAPE.

Resistance.—If a man has or attempts to have, connection with a woman while she is asleep, it is no defence that she did not resist, as she is incapable of resisting. The man can therefore be found guilty of a rape or of an attempt to commit a rape.—*Reg.* v. *Mayers*, 12 Cox, C. C. 311.

Evidence.—Where a man is charged with committing a rape, the full particulars of the complaint the woman made against him to other persons in his absence, some time after the alleged offence, may be given in evidence. *Reg.* v. *Wood*, 14 Cox, C. C. 46. Bramwell, L. J.

WITNESSES.

Discrediting Witness.—To discredit a witness by showing a statement made by him inconsistent with his testimony, the fact of such contradictory statement, and not the reason for it, is the true subject of inquiry. *Cannon* v. *State*, 9 Rep. 13.

Contradicting Witness.—The prosecutrix in an indictment for an indecent assault, which, on the facts alleged, amounted, in substance, to an attempt at rape, was asked in cross-examination whether she had not previously had connection with a man other than the prisoner, and denied it. *Held*, that she could not be contradicted. *Reg.* v. *Holmes*, L. R. 1, C. C. 334.

Character of Witness.—A witness, who is well acquainted with a person whose character is in question and lives in his neighbourhood, will be allowed to testify to his general reputation, although he may never have heard it discussed or questioned. Frequently the highest evidence which can be offered of character is of this negative kind. *State* v. *Grote*, 68 Mo. 22.

Attending Physician.—On a trial for poisoning, a physician who attended the deceased subsequent to the administering of the poison, was questioned by the counsel for the people as to the symptoms of the deceased, and as to what he had learned concerning his condition while attending him. Counsel for the prisoner objected, on the ground that the witness could not testify as to information obtained by him while attending the deceased professionally. *Held*, that the objection was properly overruled. *N. Y. Sup. Ct.*, *Pierson* v. *People*, 18 Hun. 239.

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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

In the Queen's Bench.

FERGUSON v. MAYHEW.

Ejectment—Boundary Lines—Anthenticity of Surveys.

Ejectment for E. ½ of lot 13, in the Broken Front Concession A. of Camden. The question was as to the correctness and authenticity of the survey of one McNiff, and whether his line or that of one Iredell, who succeeded McNiff, was the true line.

Held, from the documentary evidence (i), that McNiff was employed by the Crown to lay off the lots in Howard and Camden, fronting on the Thames, and to make their front boundaries; (ii) that he did so, and that the Crown adopted his work; (iii) that neither Iredell nor any other surveyor had any authority to alter or interfere with, or did alter or interfere with, the front boundaries of the lots marked by McNift; and (iv) that the Crown granted the lots in front according to such boundaries.

M. Wilson, for plaintiff.

C. Atkinson, for defendants.

[NOTE.—This case was decided about a year ago, but, being of purely local interest, has never been reported.]

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In Chancery.

[The CHANCELLOR, 12TH JANUARY, 1881.

HALLERAN, v. MOON & HALLERAN.

Statute of Frauds—Promise not to be performed within year—Executed Consideration.

The plaintiff married the defendant Halleran, a daughter of R. C. Moon, in December, 1869. In January, 1870, he agreed with Michael Halleran, his brother, to purchase N. ½ of E. ½ of lot 6, in 8th Con. Hope. The E. ½ was subject to a mortgage for $850 to the Church Society.

R. C. Moon suggested that the whole E. ½ should be bought and conveyed to his daughter, the defendant Halleran, in consideration of which he would meet the payments on the mortgage. This was done, and the land was conveyed to defendant Halleran on 26th March, 1870. R. C. Moon did not keep his promise, and plaintiff and his wife raised money and paid off the Church Society mortgage. In 1877, R. C. Moon agreed to pay $150 a-year for ten years to the plaintiff, and to leave his wife, the defendant Halleran, $1000 by will. The will was dated 18th May, 1878, whereby the defendant Moon was appointed executor. R. C. Moon died in February, 1879. This bill was filed to recover the $1000.

Held, that, though the promise was one which was not to be performed within the space of one year from the making thereof, the consideration on the part of the plaintiff having been executed by procuring the conveyance to be made to testator's daughter, it did not require to be in writing; following *Nicholls* v. *Nordheimer*, 22 C. P. 48; *Davies* v. *Appleton*, 25 C. P. 386; and that the conveyance to the daughter was a good consideration to support the promise made in 1877 in substitution of that made in 1870.

There were two receipts produced, dated 16th February, 1878, and 3rd November, 1878, in which the defendant Halleran acknowledged the receipt from R. C. Moon of the sum of $260 and $200 respectively, "being part of my fortune left me."

Held, that plaintiff was entitled to payment of the $1000, less the sums acknowledged by the receipts, with interest on the balance, from one year after the death of the deceased R. C. Moon.

Moss, for plaintiff.

Boyd, *Q. C.*, for defendants.

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THE HAMILTON PROVIDENT AND LOAN SOCIETY v. BELL.

Principal and Agent—Valuer of land—Liability of, for loss.

The plaintiffs employed the defendant, a professional land valuer, as their paid agent, to value lands for the purpose of loaning money on mortgage. He personally inspected the land in question, with knowledge that plaintiffs relied on his truthfulness and correctness. His report, however, was untrue. The bill alleged, in addition, as an alternative, that the defendant was guilty of gross neglect, unaccompanied by a belief that his representations were true. Upon a loss by the plaintiffs, they filed this bill, which was *pro confesso* against the defendant.

Held, that the defendant, being the paid agent of the plaintiffs, and professing to have skill and knowledge in matters in which he was employed, was, therefore, liable to the plaintiffs for their loss. Liberty was given to him to pay off the plaintiffs and take an assignment of their mortgage.

Silverthorne v. *Hunter*, 5 App. R. 157, distinguished.

Muir, for plaintiffs.

GOODERHAM v. TORONTO & NIPISSING RAILWAY CO. FOX v. TORONTO & NIPISSING RAILWAY COMPANY.

Receiver's Accounts—Allowance of items—Appeal from Master—Costs.

This was an appeal by G., the Receiver of the defendants, from the report of the Master, disallowing him two items in his account.

G. was appointed Receiver of the "Defendants' railway undertaking, and of the revenues, issues and profits"; and it was ordered that, out of moneys received by him, he should "provide for the working expenses of defendants' railway and other outgoings in respect of said railway undertaking, pass his accounts, and pay balance into Court."

The first item was a sum of $55.97, paid to one A. for the right of way across his land. A. was threatening to obstruct the passage of trains, by way of coercing defendants into payment.

Held, that the payment was, strictly speaking, *ultra vires*, and was properly disallowed by the Master, and the Receiver should not succeed on an appeal.

But since, under the circumstances, the action of the Receiver would have been excused, and the payment sanctioned, upon a proper application to the Court; and since, upon this appeal, it was asked in the alternative, that the item might be allowed, or such other order made as might be just, it was

Held, that the item might be allowed on this motion without a special application for that purpose.

The second item was a sum of $774, paid by the Receiver to the defen-

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dants' solicitor, for professional services in examining titles to lands on the line of a railway which defendants' company had leased.

Held, that the payment did not come within the wording of the authority of the Receiver. and was properly disallowed, and the Court had no discretion to sanction the payment as in the first case, because there was nothing to show that it was properly paid out of the funds coming to the Receiver. Costs to the respondent were confined to the appeal in respect of the solicitor's fees. *Appeal dismissed with costs.*

Maclennan, *Q. C.*, (with him, *Kingsford*), for appellant.

Wells, for Fox, an execution creditor, contra.

IRVING v. YOUNG.

Deed from person under influence—Voluntary Grantee—Independent Advice—Costs.

On a bill to set aside a conveyance, made without independent legal advice, by a person who was under the influence of the grantee in consideration of maintenance,

Held, that though no fraud or moral wrong could be imputed to the defendant, and though it was probable that, if the contents of the deed had been fully explained to the grantor by a competent legal adviser, he would still have executed it, though, perhaps, with some modifications as to detail, yet the same must be set aside as having been executed without proper advice and on account of the peculiar relationship of the parties to it. But the relief was granted without costs, as no case of actual fraud was made out.

Lavin v. *Lavin*, 27 Gr. 567, followed.

Boyd, *Q. C.*, and *Robertson*, *Q. C.*, for plaintiff.

Osler, *Q. C.*, and *Lazier*, for defendants.

Bruce, for infant defendants.

[PROUDFOOT, V. C., 19TH JANUARY 1881.

TYRWHITT v. DEWSON.

Will—Construction of—Legacy on termination of life estate.

By his will and codicil a testator devised to his son Julius, on the death of his mother, certain land, in consideration of which he was to pay to the executors in four years £150. In case of his death without heirs the lot to be sold and the amount over and above £150 "to be equally divided amongst my surviving children."

Held, that Julius took an estate in fee tail in remainder after an implied life estate in his mother; for he could not die without heirs general while his brothers and sisters were alive.

Julius died in the lifetime of his mother.

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Held, that the period of division should be the death of the tenant for life and that the survivors at the time of such death should take the whole proceeds of the sale of the lands, upon which however the £150 should form a charge.

Bain (with him *Scanlon*), for Plaintiffs.

Moss (with him *Macklem*) and *Black* for defendants.

Vacation Court.

[CAMERON, J., 14TH JANUARY 1881.

BIRKETT v. McGUIRE.

Partnership—Payments by continuing partners after dissolution—Appropriation of—Discharge of retiring partner by giving time.

When a partnership had been dissolved, and one of the partners continued to deal with a creditor of the firm, and in so dealing, the partnership and separate accounts were blended,

Held, that the payments made by the continuing partner, though without any express application, must be applied to the partnership indebtedness.

In this case also the retiring partner was held to be discharged by the giving of time to the continuing partner, and leave was granted to add a plea setting up this defence, if necessary.

Bruce, for plaintiff.

Mackelcan, *Q. C.*, for defendant.

[OSLER, J., 21ST JANUARY, 1881.

In re EGLESTON v. TAYLOR.

Award void pro tanto.

In an award, which is valid as to part and invalid as to part, if the void part can be separated from that which is valid, it should be rejected as surplusage.

Where, therefore, an award was objected to because the arbitrators had named a day for payment of the sum found due, and had directed payment of costs, when their authority was limited to assessing a certain sum for damages which, when ascertained T. had agreed to pay,

Held, that the award was void *pro tanto* only, as the matters complained of were surplusage, and a rule to set aside the award on the above grounds was discharged on the authority of *Rees* v. *Waters*, 16 M. & W. 263, and *Re Goddard & Mansfield*, 1 L. M. & P. 25.

Spencer, for the Rule.

J. E. Rose, contra.

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CRATHERN v. BELL.

Continuing Guarantee—Payment to person not the holder of.

The defendant gave to the plaintiffs a guaranty in the following words:—"In consideration of C. & C. accepting the notes of J. G. at four, eight, and twelve months for $751 each, in full satisfaction and discharge of their claim against the late firm of J. G. & Co., I hereby do, to the extent of $751, guarantee the payment of the first two of the said notes as they mature according to their tenor and effect." C. & C. endorsed the first note to persons to whom at maturity the defendants, at G.'s request, paid $275, being the extent to which G. was unable to meet the note. On the maturity of the second note the defendant paid to plaintiffs $476, being the balance of the sum of $751 for which he had made himself liable by his guaranty. An amount in excess of the sum guaranteed was paid altogether upon the first two notes, which were not, however, paid in full.

Held, on demurrer, that, in the absence of an express or implied request from the plaintiffs, the defendant could not avail himself of the payment to the holders of the first note as a partial discharge of his guaranty, as it was a voluntary payment; and that the guaranty was a continuing one, and, on satisfaction of the first note, remained available to the plaintiffs as a guaranty of the second, to the extent to which it had not been exhausted in making good the first note.

Britton, *Q.C.*, for demurrer.

Bethune, *Q.C.*, contra.

Common Law Chambers.

[OSLER, J., 10TH DECEMBER, 1880.

In re LING v. GUNN.

Prohibition—Action for Proportion of Costs of Line Fence.

The fact that no proceedings have been taken or award made under R. S. O., cap. 198, is matter of defence to an action for the proportionate part of the cost of a line fence; but forms no ground upon which a prohibition should issue, there being no excess of jurisdiction in the trial of such a case.

G. H. Watson, for summons.

R. W. Keefer, contra.

[30TH DECEMBER, 1880.

HEBLING v. DUGGAN.

Mandamus to Division Court Judge—Objection by Defendant that title to land in question.

Upon the mere statement of counsel for defendant before an acting

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Judge of a Division Court, that the title to land was in dispute, the learned Judge refused to proceed. Upon an application for a mandamus it was

Held, following the ruling of the Chief Justice of the Common Pleas in *Page* v. *Sloan*, (not reported), that the writ should go to the Judge to proceed with the case; but should it appear during the trial that the title was upon reasonable grounds and *bona fide* in dispute he should then refuse to proceed further.

See *Emery* v. *Barnett*, 4 C. B., N. S. 423.

[10TH DECEMBER, 1880.

In re PAGE v. SLOAN.

Prohibition—Title to Land in Question.

The plaintiff sued the defendant for a sum of money paid by the former to the latter for the growing timber upon an allowance for road, which the defendant had bought at auction from the Township Council. The plaintiff contended that there was no such road allowance, and that the consideration had completely failed; while the defendant disputed this, and contended that he had a title thereto, and objected to the jurisdiction of the Judge as the title to land was in question. The learned Judge refused to proceed, but in obedience to a mandamus directing him to try the case, which was issued in order to enable him to determine whether the objection was *bona fide* and upon reasonable grounds, he proceeded to try the plaint. He was of opinion that there was no such road allowance as that contended for by defendant, but made no finding upon whether there was a reasonable ground for raising the objection.

Held, upon a review of the whole evidence taken at the trial that there was no such road allowance, and that notwithstanding the claim of highway the Division Court had jurisdiction to try the case.

See *Regina* v. *Blackburn*, 32 L. J., M. C. 41.

W. H. P. Clement, for summons.

J. E. Rose, contra.

[4TH JANUARY, 1881.

BOWMAN v. MASSON.

Sheriff's Fees—Sum in Lieu of Poundage.

A writ for upwards of $79,000 was in the hands of the Sheriff of Ontario, at the suit of the Dominion Bank, for execution against the defendant, The Masson Manufacturing Company. The plaintiff in this suit had in the Sheriff's hands two writs against the defendant, and one against individuals interested in the Company for large sums. The Sheriff seized, advertised for sale, and remained in possession about two weeks, and the Bank's claim was then paid by Bowman, the plaintiff, who obtained control

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of their judgment and writ, and instructed the Sheriff to withdraw, which he did without selling. Several claims were made to the goods while the Sheriff was in possession; and some of the property was of a nature to require careful supervision, the value of the whole being about $50,000.

Held, on appeal from Mr. Dalton, who had allowed the Sheriff $60, that $150 was a reasonable recompense to him; but, as the Sheriff had unreasonably insisted upon his full poundage, the appeal was allowed without costs.

Aylesworth, for Sheriff.

J. R. Roaf, for plaintiff.

[15TH JANUARY, 1881.

In re MURPHY v. CORNISH.

Prohibition—Appeal to Sessions from order dismissing complaint.

Held, that the prosecutor of a complaint cannot appeal from the order of a Magistrate dismissing the complaint; as by the R. S. O., cap. 74, sec. 4, the practice of appealing in such cases is assimilated to that under 33 Vic., cap. 27, and under the latter the right of appeal is confined to the defendant. A prohibition was therefore ordered, but without costs, as the objection to the jurisdiction had not been taken in the Court below.

Aylesworth, for the summons.

W. Redford Mulock, contra.

McKENZIE v. KITTRIDGE.

Payment into Court instead of Appeal Bond—Costs chargeable against.

Upon judgment for defendants on demurrer they got leave to strike out the issues in fact in order that they might sign final judgment. Before this was done the plaintiff obtained a rule allowing him "to pay $400 into Court in lieu of an appeal bond to abide the further order of the Court." The only bond that the plaintiff could have been required to give was that mentioned in C. S., U. C., cap. 13, sec. 15. The plaintiff swore that the money had been borrowed by him for the purpose for which it was used.

Held, that it could not be treated as plaintiff's money, so as to be subject to the discretionary order of the Court; but that it must be used for the purposes for which alone it was deposited, viz., to meet the costs of appeal; and that these costs and the costs of this application should therefore be paid out of it, but not the costs of the cause and those of an appeal to the Supreme Court.

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[CAMERON, J., 21ST JANUARY 1881.

In re MEAD v. CREERY; THE DOMINION SAVINGS AND INVESTMENT SOCIETY, GARNISHEES.

Jurisdiction of Division Court in Garnishee proceedings.

The Garnishees, being mortgagees of land belonging to the defendant, sold the same under a power of sale in their mortgage, and stood possessed of the proceeds, in trust, to pay their own debt, etc. and then to pay the surplus to the mortgagor, the defendant. There was a surplus of some $500, which the plaintiff claimed to attach to satisfy his judgment herein amounting to $72.25. The garnishees entered upon their defence at the trial and called a witness, and the trial was once adjourned for the garnishees to show that they had not enough money in their hands to satisfy the primary creditor's claim, owing to charges upon the fund. Further evidence was given with this intent by the garnishees upon the adjourned trial, and, their evidence appearing insufficient, objection was taken to the jurisdiction of the Court, as the amount sought to be attached exceeded the jurisdiction of the Court. No notice of intention to dispute the jurisdiction was given.

Held, that the jurisdiction of Division Courts may be classed as limited in three ways:—(i) Certain causes of action, such as gambling debts, libel, etc., they have no power to try at all. (ii) They are limited by the amount of claim. (iii) They are limited territorially.

That upon the construction of 43 Vic., cap. 8, secs. 10 and 14, notice of intention to dispute the jurisdiction is only necessary when the action, being within the jurisdiction of some Division Court, is brought in the wrong Court, and is unnecessary where the objection is taken under the second class above.*

Held, also, that, although by section 124 of R. S. O., cap. 47 *any* debt may be attached, yet, by section 136 entitling the garnishee to set up *any* defence or show any cause why the debt sought to be garnished should not be paid, the defence of want of jurisdiction might be set up; and therefore the jurisdiction of the Division Courts in garnishee proceedings is limited to debts within the proper competence of such Courts to try; and, as it was considered that the objection was taken in time, the summons for prohibition was made absolute with costs.

J. R. Roaf, for summons.

Aylesworth, contra.

* The same point was decided by His Honour Judge Sinclair several weeks ago; but the report of his judgment has been held over for want of space.

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Chancery Chambers.

[PROUDFOOT, V. C., 19TH JANUARY, 1881...

GOUGH v. PACKE.

Taxation of costs—Solicitor and client's costs—Special attendance before examiner—G. O. 608.

A decree was made by consent, the plaintiff agreeing to pay the defendant's costs to be taxed between solicitor and client. The bill was filed at Toronto and the defendant's solicitor, being conversant with the case, was requested by his client to attend at Toronto and examine the plaintiff. The solicitor occupied two days in going and returning and attendance before the examiner, and expended $15.50. The defendant paid him $60 for these services. The Master allowed $6 for a special attendance of three hours.

Held, on appeal from the Master, (i) That the plaintiff would be bound to pay what the solicitor could recover from his client. (ii) That though under the authority of *re Geddes & Wilson*, 2 Ch. Cham., R. 447, the solicitor could not contract for a higher recompense than the tariff specifies, yet, as it was reasonable that the solicitor should have personally attended on the examination, and as the amount was not excessive for the whole time occupied, it was not probable that the client could have reduced it on taxation; and, being taxable against the client, it should be taxed against the plaintiff.

Appeal allowed with costs.

Hoyles, for appellant.

Foster, contra.

WOOD v. HURL.

Statutes—Construction of—Grouping clauses—Head lines—R. S. O., cap. 49, *secs.* 10 *&* 11.

Held, following *Eastern Counties &c. Ry. Co.* v. *Marriage*, 9 H. L. C., 32 and *Lang* v. *Kerr*, L. R. 3 App. Ca. 529 that sections 10 and 11 of R. S. O., cap. 49, are to be governed by the head line immediately preceding section 10.

The plaintiff was an execution creditor of one of several tenants in common upon whose lands there were two existing mortgages in different hands. The plaintiff obtained from the County Judge of the County of Peterborough an order for the sale of the equitable interest of the execution debtor, and bought the same himself. He then obtained from the Deputy Registrar at Peterborough a decree for partition against the other tenants in common.

Held, on appeal from the Deputy Registrar, following the above rule of construction, that the equitable interest of the debtor, sought to be reached

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by the execution creditor, not having been concealed by a fraudulent conveyance, the County Judge had no authority to give summary relief under section 11 of the above Statute; and as nothing passed by the pretended sale to the plaintiff, he was not entitled to the Partition Decree.

Donovan v. *Bacon*, 16 Gr. 472, n. doubted.

See *Cronn* v. *Chamberlin*, 27 Gr. 551.

Boyd, *Q. C.*, for appellant.

Shepley, contra.

In re DUNHAM.

Quieting Titles Act—Assent to devise implied until disclaimer.

The land in question was patented to A. B. in July 1807. In November 1808 A. B. wrote a letter to M. S. saying that the latter "might have his place on the condition that he should put a fence all around the clearing" in which he said he had directed a certain person to hand over the key. M. S. went into possession, and in 1828 conveyed in fee to P. P., who with his grandson I. J. P. occupied the land till "a year or two before the Rebellion." At this time P. P. invited A. his son-in-law to come and live on the lot, promising that he would give him a deed. A. accordingly entered but P. P. refused the deed. A. then determined to remain "and try and make a living on the land." In 1838 P. P. died having made a will devising the land to A. and his wife for their joint lives, remainder to I. J. P. in fee. A. was aware of this will, having attended at the reading of it after the testator's death, and never disclaimed, but occupied the land until 1877 when he affected to convey in fee to H. D. who filed his petition to establish his title to the lands. I. J. P. and a grantee of his contested his title. The learned Referee of Titles found that the petitioner had failed to establish his title.

J. E. McDougall, for petitioner.

C. C. Robinson, for contestants.

The petitioner appealed, and on a review of the whole case it was

Held, (i) that A. had become tenant at sufferance to P. P. by his entry on the latter's invitation and that he could not dispute his title, and therefore he or his assigns could not be heard to argue that P. P's title to the land was not a complete one by possession, and that P.P's will was inoperative. (ii) As A. was aware of the devise, and remained in possession without disclaiming or showing any determination not to take the estate thereby devised to him, the estate vested in him by the will.

Some thirty years after A's entry he granted part of the land to one B., and I. J. P. joined in the conveyance as a grantor.

Held, a sufficient acknowledgment of I. J. P's title as a remainder-man, and so an admission that the will was operative on the land, I. J. P. having no claim thereto except under the will.

Appeal dismissed with costs.

J. E. McDougall, for appellant.

E. Douglas Armour, contra.

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NEW BRUNSWICK.

In the Supreme Court.

ANDERSON v. MOWATT, *et al.*

[2nd Division, before WELDON, FISHER, and WETMORE, JJ.]

Jury View—When should be allowed—Interference by parties to suit—Misconduct of Jury—Affidavit of Juror.

The defendant in an action of trespass *quare clausum fregit*, while the jury were viewing the *locus in quo*, conversed and otherwise interfered with them, and provided refreshments for them at his house.

Held, a good ground for setting aside a verdict, though no protest was made till after verdict, and plaintiff himself had been guilty of improperly interfering with the jury during the view.

Held, (per Weldon, J.,) that it was improper to allow a view after the Judge had charged the jury. (Per FISHER and WETMORE, JJ.,) that the view was properly allowed.

CYR v. OUILLETTE.

[Full Court, before ALLEN, C.J., and WELDON, FISHER, WETMORE, and DUFF, JJ.]

Practice—Judgment as in case of nonsuit.

Held, that, where a cause was once entered for trial, but the trial was postponed, though the cause was not made a remanet, and a new notice of trial was subsequently given, but the plaintiff did not proceed to trial pursuant to the notice, defendant was entitled to judgment as in case of a nonsuit.

CLOSE v. TEMPLE.

[2nd Division, before WELDON, FISHER, and WETMORE, JJ.]

Contract of sale—Goods not specified—Intention to pass property in—Appropriation.

T., a brick-maker, sold 50,000 bricks out of a kiln containing 100,000 to the plaintiff, who paid the contract price, and hauled away about 16,000. The balance remained in the kiln in T.'s yard, and were never in any way separated from the rest of the kiln or appropriated to the plaintiff. The defendant (the Sheriff) subsequently sold them under an execution, at the

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suit of W. against T. Plaintiff brought trover against the defendant, claiming property in 34,000 of the bricks.

Held, per Weldon and Fisher, JJ., that the contract was executed, and the property in the bricks passed to the plaintiff at the time of sale:

Per Wetmore, J., that there being no specific identification or appropriation of the bricks, the contract was executory, and the property did not pass to the plaintiff.

Re DEZETER, an Alien.

[Full Court, before ALLEN, C.J., and WELDON, FISHER, WETMORE, and DUFF, JJ.]

Aliens—Naturalization—Certificate—Person taking oath of allegiance, etc. must grant.

The certificate required by sec. 4, sub-sec. 3, of the Act 31 Vict., c. 66, respecting aliens and naturalization, must be signed by the person who administers the oaths of residence and allegiance required by sub-secs. 1 and 2.

FLEMING v. THE NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

[2nd Division, before WELDON, FISHER, and WETMORE, JJ.]

New trial—Verdict against evidence.

Where there is a contrariety of evidence the Court will not grant a new trial, though they may be of opinion that the strength and weight of evidence were against the verdict.

GILCHRIST v. THE DOMINION TELEGRAPH COMPANY.

[2nd Division, before WELDON, FISHER, and WETMORE, JJ.]

Trespass—Arbitration as to damages—Evidence—Telegraph Company—New trial—Counsel moving for—Act 41 Vict., cap. 8.

The Court will only hear one counsel on moving for a new trial under 41 Vict., cap. 8.

The plaintiff sued the defendants (a company empowered by Act 34 Vict., cap. 52, to construct lines of telegraph in the Dominion of Canada,) for cutting and destroying shade and ornamental trees on his land while

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building their line. The Act, after giving the company power to enter on and take lands, etc., for constructing the line, provides that in case of any disagreement between the company and the occupier of any lands which they may take in respect to any damage done, the amount of such damage shall be determined by arbitrators, to be chosen in the manner therein pointed out. The 20th section contains a proviso that shade, ornamental or fruit trees shall not be cut or destroyed, unless it be necessary to do so for the erection, use or safety of the lines.

Held, that the arbitration clause did not apply to damage done to shade trees, etc., unless it was necessary for the erection, use or safety of the line, and that the burden of showing the necessity for such damage was on the defendants.

On the trial there was no positive evidence that the line was constructed by the defendants, but it appeared that they were the company authorized to build, and that they operated the line when completed.

Held, that under this evidence the jury were justified in finding that the defendants constructed the line.

LOCKHART, Surviving Executor, etc., v. RAY *et al.*

RAY *et al.*, Appellants, and LOCKHART, Surviving Executor, *et al.*, Respondents.

(EQUITY APPEAL.)

[Full Court, before ALLEN, C.J., WETMORE, and PALMER, JJ.]

Will—Surplus—Whether of both real and personal estate, or either—Intestacy as to part.

The testator after making certain specific bequests, concluded his will as follows:—"Should there be any surplus or deficiency, a *pro rata* addition or deduction, as may be, to be made to the following bequests, namely: Worn out Preachers' and Widows' Fund; Wesleyan Missionary Society; Bible Society." By the will he gave his executors power to dispose of certain lands at Sussex, but there was nothing in the will concerning four lots of land in Saint John, of which he was possessed at the time the will was made, and at the time of his death.

Held, (by Allen, C.J. and Wetmore, J., Palmer, J., *dissenting*,) varying the judgment of the Court below, that the "surplus" had reference to the testator's personal estate and the land at Sussex only, and that there was an intestacy in regard to the four lots in Saint John.

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MURRAY *et al.* v. BOURGEOIS.

[2nd Division, before WELDON, and WETMORE, JJ.]

Sale—Passing of property—Acts to be performed by seller—Trover.

Plaintiffs contracted with P. to put up 30,000 cans of lobsters for them, during the fishing season of 1879, he to paint, label and prepare the cans ready for shipment, before delivery. The plaintiffs to pay 5½ cents per can, and furnish the cans, paint, &c.; property in the fish to be the plaintiffs' from the time the cans were filled.

Held, in an action for trover against B., a purchaser at a sale under an execution against P. of 33 cases of cans put up by P., which at the time of seizure and sale were not ready for delivery, that the fact that something remained to be done by P. before they would be ready for delivery, did not prevent the property vesting in the plaintiffs.

NICHOLSON *et al.* v. TEMPLE.

[2nd Division, before WELDON and FISHER, JJ.]

Bill of Sale—Passing of after acquired property—Novus actus interveniens—License to grantee to take possession—Jus tertii—Trover.

The plaintiffs were the grantees, and one H. the grantor in a bill of sale, which specified certain property conveyed and contained the following clause—"And all property owned or to be owned by me, and including all renewal stock or stocks to be purchased by me." H. subsequently acquired possession of a horse and colt. The colt was the progeny of a mare conveyed by the bill of sale. The horse was bought in for H. at a sale had at his direction, to satisfy a lien which he claimed for keep. H. made a formal delivery of the horse and colt to the plaintiffs, stating that he delivered them to hold on the terms of the bill of sale; but H. always retained the actual possession. The defendant (the sheriff) seized and sold the horse and colt under an execution against H., and the plaintiffs claiming that the property was in them brought trover.

Held, 1st. That the property in the horse did not vest in the plaintiffs by the bill of sale, and that the symbolic delivery by H. to them with no ostensible change of possession was not a *novus actus interveniens*, nor was it an exercise by them of a license to take possession under the bill o sale.

2nd. That the colt being the progeny of a mare conveyed by the bill of sale passed to the plaintiffs.

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3rd. That the sheriff having seized and sold the horse and colt under an execution against H. could not set up that H. had no title in answer to an action by persons claiming through H.

THE QUEEN v. WILLIAM H. TOWER.

[Crown Case reserved.]

[Full Court, before ALLEN, C. J., and WELDON, FISHER, and DUFF, JJ.]

Criminal law—Evidence—Reading to witness from paper not in evidence and cross-examination as to—Intent—Log book—Admission of—Accomplice—Corroborative evidence—Comparison of handwriting—Admission of previous signature by subsequent indorser—Rebutting evidence—Effect of words "weight and contents unknown" in criminal charge.

Held, (by Allen, C. J., and Fisher and Duff. JJ.,) adhering to the old rule of the common law, that on the trial of the master of a vessel, indicted for scuttling her, the contents of a written instrument, if it be in existence, can be proved only by the instrument itself, and counsel will not be allowed to read from a paper not in evidence and found a question upon the paper so read, that this cannot be done even on cross-examination for the purpose of testing the credibility of the witness; also that sec. 64 of the Statutes of Canada, 32 and 33 Vict., c. 29, allowing a witness to be cross-examined as to previous statements made by him in writing. or reduced into writing, would not apply to protests made by the prisoner, or policies of insurance issued to the witness, or to receipts, which it did not appear the witness had either written, signed, or even seen, until they were shown to him in the witness box; but

Held, by Weldon, J., that it was competent, on the cross-examination of the witness to put into his hands a policy of insurance, not in evidence, and ask him if he did not see certain words in it; also, to read from a paper purporting to be a protest made by the prisoner, and to ask the witness if he did not write the protest, and if certain words were not in it.

Held, also, (by Allen, C. J., and Fisher and Duff, JJ.,) that where the indictment in certain counts charged the destruction of the vessel with intent thereby to prejudice the underwriters, and in others simply charged the crime, without alleging the intent and the prisoner was found guilty on all the counts, even if it were necessary to show that the prisoner had knowledge of the insurance, as to which they expressed no opinion, the Court could, if necessary, alter the verdict to a finding on the counts which did not allege the intent.

Held, by Weldon, J., that it was not necessary to show the prisoner's knowledge of the insurance, as he must be presumed to have intended the necessary consequence of his act, which was to prejudice the underwriters.

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It appeared on the trial that the prisoner, with the greater portion of his crew, including the mate, had gone before a Naval Court and given a false account of the loss of the vessel, also that the prisoner had persuaded the mate to suppress the log book and swear that it was lost; *Held*, (Fisher, J., *dubitante*) that the log book was properly received in evidence.

Held, that proof of the receipt by the prisoner of drafts for large sums of money, drawn by parties in C, from which the vessel which the prisoner was charged with scuttling, sailed, was properly received, and being unexplained by the prisoner, they were properly left to the jury as evidence against him.

Held, also, by Allen, C. J., and Duff, J., (Weldon, J., *dissenting*) that the signature of one R. to an invoice was properly proved by a witness comparing it with a signature purporting to be by R,, as endorser of a bill of exchange, his endorsement being prior to that of the prisoner. But, by Weldon, J., that the evidence being immaterial, its reception was not sufficient to warrant the quashing of the conviction of the prisoner.

The principal witness for the Crown, who had himself done the act of scuttling the vessel, at the instigation of the prisoner, on his examination in chief, stated that he bored auger holes in the air streak. On cross-examnation he was asked how far below the water he bored, etc. On the part of the defence, it was sworn by several witnesses that the air streak of the vessel, alleged to have been scuttled, was above the load line, and that if the holes were bored in the air streak, they must have come out above the water. The Chief Justice allowed the Crown to call rebutting evidence for the purpose of showing that the air streak was below the load line. *Held*, that the evidence was properly allowed.

There is no positive rule of law that the testimony of an accomplice must receive direct corroboration, and the nature and extent of the corroboration required, depend a great deal upon the character of the crime charged. Therefore, where the Judge directed the jury, "that it was not necessary that T (the accomplice), should be corroborated as to the very act of boring the holes in the vessel, if the other evidence and circumstances of the case satisfied them that he was telling the truth, in the account which he gave of the destruction of the vessel, that would be sufficient." *Held*, a proper direction.

Held, that the words in a bill of lading "weight and contents unknown," would not prevent a jury from having the right to draw whatever inference of guilt they pleased against the prisoner, from his knowledge that the cargo was not what the bill of lading represented it to be.

A new trial will not be granted to the Crown in a criminal case; neither has the Crown an appeal to the Supreme Court of Canada from a judgment quashing a conviction. (WETMORE, J., doubting as to the right of appeal.)

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REGINA v. FERGUSON.

[Crown Case reserved.]

[1st Division, before ALLEN, C. J., and DUFF and PALMER, JJ.]

Criminal law—Previous acquittal of principal felon—Indictment—Amendment.

On the trial of the prisoner on an indictment charging him with receiving property which one M. had feloniously stolen, &c., the evidence showed that he had stolen the property, and that the prisoner was guilty of receiving the same knowing it to have been stolen. For the defence it was proved that M. had been previously tried on a charge of stealing the same property, and acquitted. The counsel for the prosecution then applied to strike out of the indictment the allegation that M. had stolen the property, and to insert the words, "some evil disposed person," etc., which the Judge allowed.

Held, 1st. That the record of the previous acquittal of M. formed no defence on the trial of this indictment, and was improperly received in evidence.

2nd. That the amendment was improperly allowed.

ROBERTSON v. JONES, *et al.*

[Full Court, before ALLEN, C.J., and WELDON, FISHER, WETMORE and DUFF, JJ.]

Co-partners—Money borrowed by one partner—Liability of firm for.

Held, by Allen, C.J., Wetmore and Duff, JJ., that the mere fact that money borrowed by a member of a firm has been applied to partnership purposes, is not sufficient, of itself, to render the firm liable, at law to repay it, when there is no actual or implied authority to borrow, and there has been no ratification of the loan. The authority of one partner to bind the others by his contracts is a branch of the law of agency; and the test of the partnership liability is—not whether the money came into the business of the firm, but whether the partner had any authority, express or implied, to borrow it.

Held, by Weldon and Fisher, JJ., that where money belonging to the plaintiff, was received by one partner and by him handed to the cashier

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of the firm, who deposited it in a bank to the credit of the firm, plaintiff was entitled to recover it from the firm irrespective of what might be the private agreement between the partners.

ROBINSON v. CLARKE.

[Full Court, before ALLEN, C.J., and WELDON, WETMORE, DUFF and PALMER, JJ.]

Costs—Certificate for—When party, suing in Supreme Court and not recovering more than might have been recovered in County Court, entitled to.

The plaintiff having made use of abusive language to the defendant, the latter laid an information before the Police Magistrate of Portland, upon which a warrant issued, and the plaintiff was arrested and imprisoned in the lock-up for several hours before he obtained bail. He was afterwards convicted, but the conviction was set aside. The plaintiff paid out thirty dollars for expenses in procuring his discharge. In an action against the Police Magistrate the plaintiff recovered one hundred and fifty dollars; in this action fifty dollars. The right of the magistrate to issue the warrant, and his right to try the complaint were both raised by the pleadings. The question of granting a certificate for costs having been referred to the Court, it was *held* (by Weldon, Wetmore and Duff, JJ., Allen, C.J. and Palmer, J., *dissenting*,) that this was not a case in which a certificate should be granted.

TAIT, Assignee, etc., Appellant, v. DOWLING, Respondent.

[1st Division, before ALLEN, C.J., and DUFF and PALMER, JJ.]

Insolvent Act of 1875—*Sec.* 95—*Costs—Power to Award—Appeal.*

Held, on appeal that the County Court Judge had power to award costs under section 95 of the Insolvent Act of 1875, against the assignee on his contestation of a claim filed against the estate; and as the Judge had such

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power, the appeal was dismissed, it being a well settled rule of practice that an appeal will not be allowed on a question of costs.

TAYLOR, *et al.*, Executors of Justus S. Wetmore, Deceased, Appellants and BURNETT, Respondent.

[2nd Division, before WELDON and FISHER, JJ.]

Sale of land—Tender of conveyance—Recovery of deposit—Waiver.

It is the duty of the vendor of lands to prepare and tender the conveyance.

B. purchased land at an auction sale and paid a deposit, under an agreement that he was to receive a clear title. The land was incumbered and the incumbrance was not removed at the time limited for the giving of the deed.

Held, that B. could treat the contract as rescinded and sue for the purchase money even though he knew of the incumbrance at the time of sale.

WOOD v. MACKAY.

[Full Court, before ALLEN, C. J., and WELDON, FISHER, and DUFF, JJ.]

Slander—Action for—Costs—where Plaintiff recovered $8.

Held, in action for slander that a verdict for $8, or 40s. currency, will entitle a plaintiff to costs, the Stat. 21, Jac. 1, c. 16, having been adopted in this Province on its establishment as a part of the practice of the Court, and the universal practice having been to read it as meaning forty shillings currency, and not sterling.

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THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

In the Common Pleas.

[HILARY TERM, 1881.

HEADSTROM v. TORONTO CAR WHEEL COMPANY.

Contract—Action for non-acceptance—Failure to deliver goods in accordance with contract—Promissory note—Payment.

This was an action for breach of contract to accept a quantity of iron of a brand known as the "Depore," and the question was whether certain iron tendered to the defendants complied with the contract.

The Court, on the evidence set out in the case, *held* that it did not, being iron of a different brand, called "Menomine" iron, and therefore the defendants were not liable.

There was also a count on a promissory note given to the plaintiff in the course of their iron transactions; but which the Court, on the evidence also set out in the case, *held* to have been paid except as to $19.64 for which the plaintiff was held entitled to a verdict.

Hector Cameron, Q. C., (with him *Bigelow*), for plaintiff.
Geo. Kerr, Jr., (with him *Akers*), for defendants.

FREEHOLD LOAN AND SAVINGS SOCIETY v. FARRELL.

Building Societies—Note as collateral security by person not a member—Validity—Motion by plaintiff—Right of defendant to raise defence not coming within plaintiff's motion.

Held, that under C. S. U. C., cap. 53, sec. 40, and 36 Vict., cap. 104, sec. 9. (D) the latter Act specially relating to the plaintiffs, a Loan and Savings Society, they were empowered to take as collateral security for a mortgage given by a person not a member of the company, the promissory note of a person not a member of the company.

In the mortgage in this case, to which the note of the defendant was given as collateral security, no interest was specified, but it was paid in

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advance until February, 1878, but thereafter it was paid at the end of the year instead. It appeared that in February, 1878, a new mortgage had been executed by the mortgagor and handed to the company, but which they said they never accepted, as the terms upon which they agreed to accept it, namely the procuring of a new note from defendant, as collateral security had never been done, and that they held to the first mortgage and note. The learned Judge at the trial found in the plaintiffs' favour on this point.

Held, that, on a motion by the plaintiffs to enter a verdict for them on another ground, the defendant (not having made a separate motion) was not in a position to show that the finding of the learned Judge was erroneous.

Robinson, *Q.C.*, for plaintiffs.

Ferguson, *Q.C.*, for defendant.

CHAMBERLAIN v. TURNER, *et al.*

Assessment and Taxes—Taxes when due—Demand.

On the 2nd April, a by-law was passed by the Corporation of the City of Toronto, imposing the rate for the year 1880, and on the same day another by-law was passed making provision for the payment of the taxes over $5.00 by instalments, and declaring that all taxes should be due on the 4th June, 1880, but that on prompt payment of the first instalment on the said 4th June, the time would be extended for the payment of the other instalments to days named, and on such non-payment an aditional charge of 5 per cent was imposed. It was also expressly provided that nothing therein contained should affect or diminish the collector's right when he deemed it expedient, after a proper demand made, to proceed at any time before the said several days, to collect the said taxes by distress, etc. By the Statute the right to distrain was given on neglect to pay fourteen days after demand, and such demand should be made by calling at least once at the party's residence and demanding the taxes. The Statute also provided that all taxes levied for any year should be considered to be imposed and to be due from the 1st January thereof, unless otherwise expressly provided by By-law. The tax collector about the 20th May left with the plaintiff, whose taxes were over $5.00 a tax bill in accordance with the above by-law, stating that the taxes were due on 4th June, but that payment could be made by instalments, etc.; and that by want of punctuality, the party not only forfeited such right, but rendered the party's goods liable to distress on neglect to pay, fourteen days after demand. After the 4th June, without any further demand the tax collector issued his warrant to his bailiff who distrained the plaintiff's goods on the 12th June, and sold them on the 18th June.

Held, that the taxes were not due until the 4th of June and that no demand could be made until that date, and therefore the leaving of the tax bill before that date, even if otherwise a demand, could not be deemed to

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be such; and *quære* whether the mere leaving of such a tax bill even after the 4th June could be deemed to be a demand.

Held, also that the insertion in the by-law of the discretionary power of the collector to distrain at any time, was improper.

The plaintiff was therefore held entitled to recover the value of his goods sold.

McCarthy, Q.C., (with him, *A. M. Macdonald*), for plaintiff.

J. E. Rose and *McWilliams*, for defendants.

In Chancery.

[THE CHANCELLOR, 8TH FEBRUARY, 1881.

CHAMBERLAIN v. SOVAIS.

Judgment Creditor's Remedy in Equity as against an Equity of Redemption.

A judgment creditor had a writ in the Sheriff's hands against the lands of the defendants S., which were subject to a mortgage to L., whose executors were party defendants in this suit.

Held, that plaintiff was entitled to the same relief as upon a bill by a puisne incumbrancer against a prior mortgagee and the mortgagor; and, notwithstanding R. S. O., cap. 49, sec. 5, inasmuch as he could not frame his suit in the County Court in which he had obtained his judgment, so as to obtain as effectual a remedy as that sought herein, that he might therefore resort to Equity.

B.'s executors were also liable upon the plaintiff's judgment, and set up that they were sureties for the defendants S. All parties being represented, and none objecting, a reference was granted to B.'s executors, who were defendants, to prove their suretyship, in which event they would have the same relief as was granted in *Campbell* v. *Robinson*, 27 Gr. 634.

N. D. Beck, for plaintiff.

G. H. Watson, *H. Cassels*, and *H. Beck*, for defendants.

[See *Biscoe* v. *Ward*, infra.]

BANK OF TORONTO v. IRWIN & MORRISON.

Reformation of mortgage—Fraudulent conveyance.

A mortgage by defendant Irwin which recited that it was agreed to be given to secure notes held by the plaintiffs and contained covenants for title was reformed by substituting for one of the parcels inserted by mis-

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take which did not belong to the defendant Irwin, a certain other lot proved to be his at the time of making the mortgage.

After the mortgage the defendant Morrison purchased from his co-defendant the substituted lot at an absurdly inadequate price, but the sale, being attended with suspicion, was set aside as fraudulent under the Statute of Elizabeth.

A writ was in the Sheriff's hands at the suit of the plaintiffs against the lands of defendant Irwin at the time of the dismissal of the bill hereafter mentioned and at the time of the sale to Morrison. The defendants set up that a bill to redeem the plaintiffs by defendant Irwin had been dismissed after decree and account taken at the plaintiffs' instance for non-payment and that the plaintiffs by the foreclosure had elected to take the land for their debt.

Held, nevertheless that the plaintiffs might proceed for their debt.

Maclennan, *Q. C.* (with him *Kingsford*), for plaintiffs.

Moss and *Black*, for defendants.

HOLTBY v. WILKINSON.

Will—Construction of—Vested Remainder—Falsa Demonstratio.

A will written by the Testator's niece, at his dictation, contained the following clauses: "I will and bequeath that all my property, real or personal, that is to say, real estate or personal property be owned, possessed and inherited by my wife, M. G., during her natural life, subject to the further provisions of this my will, so that all claims set forth, or hereafter mentioned be paid by her out of the property willed to her by me, or that she make good all the claims to the different parties or objects hereinafter mentioned of either real estate or personal property, or in anywise in this my last will. I will and bequeath to W. G., the adopted boy, that when he is of the age of twenty-three years, two hundred acres of land, the west half of lot No. 14, 8th Con. Township of Amaranth; or if sold before he arrives at the years mentioned in this will, that some other plot of land or money amounting in value to the above mentioned lot be given him in lieu of said lot." In a subsequent part of the will he enumerates among "the different properties or estates of which I hold as being my real estates," "lot No. 14 being 200 acres 8th Con. Township Amaranth." A further clause read: "I will and bequeath that my Executor and Executrix have the power to dispose of the property if they think proper."

Before the will was made the Testator had contracted in writing to sell the west half of lot 14 subject to forfeiture if the purchaser did not perform the conditions. W. G. survived the Testator, but died before attaining 23.

Held, that W. G. took a vested remainder in fee simple expectant upon the life estate of M. G.

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The sale of the west half was carried out by the Executors.

Held, that the description in the devise to W. G. was *falsa demonstratio*, and that W. G. was entitled to the proceeds of the west half and not to the whole 200 acres.

J. Fleming, for plaintiff.
W. Mulock, (with him, *Milligan*), for defendant.

[BLAKE, V.C., 3RD FEBRUARY, 1881.

PIERCE v. CANAVAN.

Exoneration—Marshalling—Right of First Purchaser of part of Equity of Redemption, to cast burden of Mortgage on other lands comprised in the Mortgage, in the hands of Vendor or subsequent purchaser from him.

One Beales owned two lots D. and E. He mortgaged them to one J. who assigned the mortgage to M. Subsequent to this assignment Beales transferred his interest in the two lots to J. J. then sold part of lot D. to Pratt, who sold to the plaintiff. J. then sold the rest of lot D. to the plaintiff: subsequently J. conveyed lot E. to C. who then sold it to the defendant. The plaintiff paid his purchase money for the whole lot in full, and received conveyances which contained the usual covenants in the Statutory short form against encumbrances, and for quiet enjoyment. The plaintiff was to become absolute owner of lot D., and the mortgage upon it when he bought it, was to be paid off by his vendor J. This not having been done, the bill was filed to cast on lot E. the whole amount of the mortgage and to exonerate lot D. in the hands of the plaintiff. It was argued on behalf of the defendant that although lot E. in the hands of J. would be liable to be charged with the whole mortgage, as J. had agreed with the plaintiff that the plaintiffs lot D. should be free from the mortgage, yet, as between the plaintiff and defendant, the right of the plaintiff to cast the whole mortgage upon lot E. depended upon the notice of that equity which the defendant had when he bought lot E. That the only notice which the defendant had was that acquired through the Registry office, he being bound to search on lot D. as well as lot E., *(Clark* v. *Bogart*, 27 Grant 450): that the notice there acquired, was of a conveyance to the plaintiff from J. with a covenant, in the short statutory form against incumbrances: that that covenant did not give notice of any agreement between the plaintiff and J. to indemnify the plaintiff against anything but J.'s acts and that the mortgage being an incumbrance not created by J. the covenant did not extend to it and the defendant had therefore no notice of such agreement. It was however

Held, 1. That as lot E. in the hands of J. was subject to the whole charge in favor of the plaintiff so when J. parted with it, it passed subject to the rights of the plaintiff which remained until lost by the act or omission of the plaintiff.

2. That as the plaintiff had the right while lot E. remained with J. to take steps for his indemnification out of lot E. in respect of the mortgage

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the mere transference of lot E. to another did not deprive him of this right as the plaintiff had the right or equity as against the lot.

John S. Ewart, for plaintiff.

J. H. Ferguson and *F. E. Hodgins* for defendants.

NORRIS v. MEADOWS.

Mortgage—Personal Remedy—Demurrer.

M., the owner of one lot of 100 acres and another of 50 acres, subject to two mortgages, one for $1,600 and the other for $500, sold the 50 acres to C. for $1,600, subject to the $1,600 mortgage, M. covenanting absolutely for title, except as to the latter mortgage, which in fact was the consideration for the sale; it being intended and agreed, although there was no covenant to that effect, that C. should pay this mortgage and indemnify M. against the same. Subsequently M. sold the 100 acres, and conveyed the same by a deed which contained absolute covenants for title, although it was understood that the sale was subject to the $500 mortgage which was the consideration for the sale. C. died, and his representatives sold the 50 acres to A., who covenanted to pay off the $1,600 mortgage. It not having been paid, the lands embraced therein were sold by the mortgagees to the plaintiff, who now asks payment of the $1,600 by the representatives of C.

Held, on demurrer, that there was no privity between the plaintiff and defendant, and that the personal claim against the representatives of C. remained with M.

Bethune, Q. C., for plaintiff.

Boyd, Q. C., for defendant.

STAMMERS v. O'DONOHOE.

Specific Performance—Statute of Frauds—Misrepresentations in Advertisement.

An agreement for sale of land did not state the name of the vendor, nor was it signed by him, but on the back of the agreement appeared these words, written by the auctioneer, "O'D. & H. property, near Newmarket, 81¼ acres. S. J. Stammers." It was proved that the defendant O'D. owned the land in question, and that there was but one sale to the plaintiff. Several letters also were put in evidence signed by the defendants, referring to the "Stammers purchase," urging the plaintiff "to close," and threatening suit to compel specific performance. A draft conveyance was also prepared, but not signed by defendant, and sent to the plaintiff's solicitor for approval.

Held, that, although the original agreement was not a sufficient com-

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pliance with the provisions of the Statute of Frauds, yet the subsequent letters satisfied the requirements of that Statute.

The advertisement referred to the lands as "cleared and fenced."

Held, that these were not mere words of commendation, but representations of fact, which the defendant was bound to make good, and compensation was decreed.

Bain, for plaintiff.

Haverson, for defendant.

FERGUSON v. FERGUSON.

Statute of Limitations—Costs.

Where a defendant, by his answer, denied the existence of an agreement which, however, was proved at the hearing, but it appeared that the claim of the plaintiff was barred by the Statute of Limitations, the bill was dismissed without costs; although, had the defendant simply relied on the Statute, he would have been allowed his costs.

R. M. Fleming, for plaintiff.

Moss (with him *Milligan*), for defendant.

[9th FEBRUARY, 1881.

BISCOE v. WARD.

Practice—Administering equities between Co-defendants.

Where the defendants in a mortgage suit set up equities as between themselves, in which the plaintiff has no interest, the Court, while directing a reference for the purpose of settling and adjusting these equities, will take care to see that the plaintiff's remedies are not thereby delayed.

Cayley v. *Hodgson*, 13 Gr. 433, disapproved of.

Bill for sale by mortgagee against the mortgagor; the defendant Ward, who had taken an assignment of the equity of redemption, and had covenanted with the mortgagor to pay off the mortgage; the defendant Caston, who had taken an assignment of the equity of redemption, and had given a similar covenant to the defendant Ward; and the defendants, the Grants, who had covenanted with the mortgagee for payment of the mortgage debt, and against whom the bill was taken *pro confesso*.

Eddis, for plaintiff, asked for the usual mortgage decree, with reference as to incumbrances, and a personal order against the mortgagor and the Grants.

W. N. Ponton, for the mortgagor, contended that the mortgagor stood in the position of a surety for the payment by the defendant Ward, who should be ordered to pay the plaintiff's claim; and that, in the event of

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the mortgagor having to pay it, then he should have an order over against Ward; and he relied upon *Campbell* v. *Robinson*, 27 Gr. 634, as entitling him to this relief.

J. H. Ferguson, for the defendant, Ward, contended that the bill should be dismissed as against his client, as it prayed for no relief as against him.

BLAKE, V.C.:—Formerly the practice of this Court was, on granting relief as between co-defendants, or granting a reference for the purpose of settling and adjusting their equities, to keep the plaintiff before the Court until such rights and equities had been finally determined. This was the course adopted in *Cayley* v. *Hodgson*, 13 Gr. 433, and various other cases; but it was found to operate harshly upon the plaintiff, who was delayed in his own proceedings and kept waiting, sometimes for many years, and was thus debarred from obtaining the relief to which he was entitled, until, in some cases, lapse of time, with its consequent accumulation of interest and deterioration in value of the premises, made his security insufficient, and his relief but nominal. The more modern] and, as it appears to me, the preferable rule, has been that, whenever in a mortgage suit the equity of redemption has become in any way entangled by dealings between the persons interested therein, which has given rise to equities as between themselves, the Court will not allow the plaintiff's remedies to be thereby delayed, but will give him the full measure of relief to which he may be entitled as against any or all of the defendants, and will leave them to work out their equities between themselves at their leisure. This rule was adopted in *Johnson* v. *Neser* (*a*), and is the rule which I shall now follow.

Decree accordingly.

(*a*) Heard before Proudfoot, V.C., on 24th March, 1875, but not reported. The decree in that case, after directing the usual accounts and enquiries in a mortgage suit, ordered that the Master do, as a separate reference, so that the plaintiff shall not be delayed thereby, proceed to enquire which of the defendants are entitled to the equity of redemption in said lands as between themselves; and whether any of the defendants are entitled as against any other of the defendants, in the event of a sale, to have any and what portion of the said lands first offered for sale, to satisfy the plaintiff's claim; and the plaintiff not to be liable to pay any costs of, or incidental to, this enquiry, or the subsequent proceedings thereon; and the Master to report specially all circumstances affecting the costs of the same; and the question of the costs as between the said defendants reserved until after the Master shall have made his report.

See Decree Book 27, fol. 149.

(Reported by A. H. Marsh, Esq., Barrister-at-Law.)

[PROUDFOOT, V.C., 10TH FEBRUARY, 1881.

BURRITT v. BURRITT.

Appeal from Master's Report—Liability of Co-Trustees—Foreign Securities.

A testator by his will expressing the fullest confidence in C., one of his trustees, directed his trustees to be guided entirely by his judgment as to

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the sale, disposal and re-investment of his American securities, and declared that his trustees should not be responsible for any loss to be occasioned thereby. C. having made improper investments of these moneys the Master charged his co-trustee, R., with the amount of the same.

Held, that although at the suit of creditors R. might have been chargeable, yet as against legatees he was exonerated.

J. Hoskin, Q.C., for plaintiff.
Boyd, Q.C., for defendant.

OWENS v. TAYLOR.

Patent for Invention—Novelty.

The mere attaching of the support of the handle of a pump higher or lower in position than that formerly in use, is not the subject of a patent.

SCHOOL TRUSTEES, ETC., v. NEIL.

Officers of Corporations—Irregular Appointment of.

One T., who acted in the capacity of Secretary-Treasurer of the plaintiffs, but who had not been appointed in writing, and had not given security as required by the Statute in that behalf, absconded with certain moneys which had been received by him as such Secretary-Treasurer from the defendants. The plaintiffs had recognized T. as their Secretary-Treasurer by intrusting him with the custody of their books and papers, by allowing him to receive moneys for them, by auditing his accounts and receiving and approving of the auditors' reports.

Held, that R. S. O., cap. 204, sec. 99, which provides that, "in the case of a rural school section corporation, the resolution, action or proceeding of at least two of the trustees shall be necessary in order lawfully to bind such corporation," does not apply to acts of duty of the Secretary-Treasurer.

Held, also, that, if a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, a regular appointment will be presumed, and his acts will bind the corporation, although no written proof is, or can be, adduced of his appointment.

WALMSLEY v. RENT GUARANTEE CO.

Ultra vires—Liability of Company—Of Directors and Shareholders.

A company, receiving money on deposit which is placed to its credit at a bank, is liable for the money so received, though the taking of money by deposit be *ultra vires;* and if the officers of the company use such moneys

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in other *ultra vires* transactions, that may be a proper matter for the shareholders to charge those officers with, but it is not one with which the depositor has anything to do.

One E. advanced $4000 to I. & M. on the guaranty of the defendants' company clearly acting *ultra vires*, who obtained as security for such guaranty an order from I. & M. on the Water Works Company for the amount. I. & M. afterwards induced the defendants to give up the order on replacing it by orders for half the amount. E. recovered judgment by default against the defendants, and by *sci. fa.* recovered the amount of his loan.

Held, affirming the Master's report, that B., who was one of the directors of the defendant's company, and who had been instrumental in procuring the above guaranty, was properly charged with $2131.83, the amount the defendants had lost through the delivery up of the order on the Water Works Company; but that he was not liable to the defendants for the balance of the claim of E., since it had been made up to the defendants by the moneys realized on the orders by which the order so delivered up had been replaced.

Held also, that, in order to charge the directors of a company for an act *ultra vires*, it is not enough to show that they are guilty of a mistake or error of judgment; but the act must be so clearly a voluntarily act of *ultra vires*, as to show a want of good faith.

Semble that, where *ultra vires* transactions are stated in the accounts of the company, laid before its members at the regular meeting of the shareholders, and are adopted by them, the shareholders are equally liable with the directors.

Semble also, that a judgment obtained by a stranger against a company is not *res judicata* as between the directors and the shareholders, and does not estop the latter from showing that the transaction giving rise to such suit was *ultra vires*, so as to charge the directors.

Semble also, that there may be contribution between parties to *ultra vires* transactions as distinguished from illegal ones.

Foster, for plaintiff.

Spencer, (with him, *W. Cassels*), for the Company.

Maclennan, *Q. C.*, (with him, *Moss*) and *Bain*, for other parties.

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Vacation Court.

CLARK v. FARRELL.

Stat. Anne, ch. 14, sec. 1—Claimant of goods seized—Non-removal from demised premises.

Held, by Cameron, J. that the Statute of Anne, ch. 14, sec. 1 which provides that goods seized under an execution shall not be removed from the demised premises until the rent due is satisfied, applies only as between the execution creditor and the landlord, and not to persons otherwise claiming the goods, as here under chattel mortgage, against whom notice is not deemed equivalent to a distress.

Semble also, that the Statute does not apply when the goods are not removed from the demised premises.

J. Crickmore, for plaintiff.

J. B. Clarke, for landlord.

Aylesworth, for sheriff.

Common Law Chambers.

[GALT, J., 4TH FEBRUARY 1881.

MERRILL v. MCFARREN.

Where a defendant was examined as a judgment debtor, and admitted on his examination that he had in his possession a sum of money which he had acquired by betting and not by converting his property into money, and which he then refused to hand over, an order to commit him on the ground that he had made unsatisfactory answers within the meaning of s. 305 of the Common Law Procedure Act was granted.

A. H. Meyers, for plaintiff.

F. E. Hodgins, for defendant.

[OSLER, J., 12TH FEBRUARY 1881.

SLATER v. CORNISH.

THE QUEBEC BANK v. CORNISH.

Interpleader—Application by execution creditors.

The Bailiff of a Division Court, on proceeding to the defendant's premises to make a levy under a writ at the suit of the Quebec Bank, found the

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Sheriff in possession under a prior writ at the suit of Slater, and showed him his writ, telling him what he had come for. The Bailiff believing that the goods were not sufficient to cover both executions did nothing further although he was frequently told to notify the Sherift in a more formal way. The clerk of the attorney for the Quebec Bank also conversed with the Sheriff several times, telling him that the Bank had a Division Court execution in the Bailiff's hands, and that they wanted to share in the surplus, if any. The Sheriff obtained an order for an interpleader issue to be tried between Slater and Badenach, a trustee for creditors, who claimed the goods. The issue had been delivered and returned and was ready for trial. By consent of parties the goods had been sold, and a large surplus over Slater's execution was realized. The next day the attorney for the Quebec Bank notified the Sheriff, in writing, not to hand over the surplus to the claimants. A summons was on the same day upon these facts granted by Wilson, C. J. to the Quebec Bank, calling upon the Sheriff, Slater and Badenach the claimant, to show cause why the interpleader order and issue should not be amended, so as to allow the Bank to join and contest the claimant's right. Upon the return of the summons Osler, J.

Held, that as all the parties were before him, and as the Sheriff did not object to this application, and might immediately apply if this summons were discharged, there was no reason why the order should not be made on payment of nominal costs. He therefore directed the Quebec Bank and Badenach to proceed to an issue which should abide the result of the the issue between Slater and Badenach.

E. Douglas Armour, for the Quebec Bank.

Aylesworth, for the Sheriff and Slater.

J. B. Clarke for Badenach.

First Division Court, Wentworth.

THE MANUFACTURERS' AND MERCHANTS' MUTUAL FIRE INSURANCE COMPANY

v.

CAMPBELL.

Jurisdiction—Amount ascertained by signature—Notice excepting.

This was an action to recover the sum of $155.96, as assessments made on a premium note given by the defendant for an amount within the jurisdiction of the Superior Courts, for losses alleged to have been sustained by the company in the usual course of business, and for the

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expenses of the company. The action was commenced after the Division Courts Act of 1880 came into force. The defendant had not given a notice disputing the jurisdiction under the 14th section of the Act of 1880.

JUDGE SINCLAIR:— This case presents two questions for decision.

1. Are these assessments to the amount of $155 96, made on this premium note given for an amount beyond the jurisdiction of either County or Division Courts, within the jurisdiction of any Division Court?

2. If beyond such jurisdiction originally, does the Court acquire jurisdiction by the omission of the defendant to give notice disputing the right of such Court to entertain the case?

As to the first question, I am of opinion that the case is not within the jurisdiction of this Court, unless the want of notice under the 14th section of the amending Act gives jurisdiction. There is not an absolute promise to pay a certain sum of money at a fixed time. The plaintiffs were empowered by the 45th section of the Mutual Fire Insurance Companies Act, to "accept premium notes or the undertaking of the insured for insurances," and to "issue policies thereon; said notes or undertakings to be assessed for the losses and expenses of the company," in the manner thereinafter provided. By the 47th section, it is declared that "all premium notes or undertakings belonging to the company shall be assessed under the direction of the board of directors, at such intervals from their respective dates for such sums as the directors determine, and for such further sums as they think necessary to meet the losses and other expenditures of the company during the currency of the policies for which said notes or undertakings were given, and in respect to which they are liable to assessment."

From the nature of the contract it will be seen that the following contingencies chiefly exist at the time the premium note or undertaking was given, and without some of which occurring no liability would ever have arisen. First, that losses should arise or expenses be incurred. Second, the amount to be raised for such losses and expenses must be assessed, and the proper proportionate sum ascertained which each premium note or undertaking should bear for the payment of same. Third, that the assessment should otherwise be duly made according to the Statute under which these companies are formed. It is thereby apparent that, when the premium note was given, the extent of the liability was undetermined and uncertain. A liability might probably arise, but if the contract should be determined by the company before any loss arose, then any assessment would have been improper. The original amount of the premium note was only an arbitrary sum. Its payment was merely conditional, and the assessments made upon it cannot stand in any better position. The promise was to pay a sum to be hereafter ascertained, and provided certain things happened; but even on their happening, the amount as determined was not "ascertained" by the signature of the defendant, but under the direction of, and by, a board of directors. That is not what the Statute requires as a pre-requisite of jurisdiction. If the debt was not "ascer-

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tained " when the note left the defendant's hands, what occurred afterwards would not make it so. *Munday* v. *Asprey*, L. R. 13, Ch. D. 855. I therefore think the claim was not actionable in any Division Court, unless the absence of notice disputing jurisdiction allowed it to be done.

As to the second question, I am of opinion that the plaintiffs must fail on that also. It depends upon the construction to be placed on the 14th section of the Act of 1880. The words of that section—" in all cases where a defendant, primary debtor, or garnishee intends to contest the jurisdiction of any Division Court to hear or determine any cause, matter or thing *in such Court*," refer, in my opinion, to cases properly within the jurisdiction of *some* Division Court, but in which, if sued in the wrong Court the question of jurisdiction can only be raised by giving the notice. By the 10th section, the parties to any suit " *within the jurisdiction* of the Division Court," may consent to try it in any Court. Consent could not avail under that section if the cause was not actionable in *some* Division Court, yet, if the plaintiffs' contention in this case is correct, the Court could acquire jurisdiction under the 14th section by the omission of the defendant to give the notice, which it would not possess under the 10th section by express consent. I do not think the legislature intended or desired to infringe upon the jurisdiction of the higher Courts, by giving the Division Courts jurisdiction when the defendant has not given the notice under the 14th section; and more especially so since that could not be done by express consent. At page 105 of Maxwell on Statutes it is thus laid down :—" It is perhaps on the general presumption against disturbing the established state of the law, that the strong leaning rests against construing a Statute as ousting or restricting the jurisdiction of the Superior Courts. It is supposed that the legislature would not make so important an innovation, without a very explicit expression of its intention." Applying these words to the construction of this section I think it too much to infer that the jurisdiction of the Superior Courts could be ousted by the defendant's default. On the contrary, the remedy intended was for that class of cases which was actionable in some Division Court, but improperly sued in a wrong Division. The provision in the 11th section allowing the transfer of suits entered in the wrong Court, " and which might have been entered in some other Division Court," is in favour of the view here expressed. For these reasons I think the case cannot be heard, and there will be no order.

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THE

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OF CHATTEL MORTGAGES WHERE THE TERM OF CREDIT EXCEEDS A YEAR.

IN the last number of this journal Mr. Ewart discusses, or perhaps rather suggests, and at the same time answers the question, "Have all chattel mortgages to be registered?" Of course no reference is had to those cases wherein the question of validity is confined to the immediate parties to the instrument, and wherein the rights of creditors, subsequent purchasers or mortgagees in good faith (*a*) do not arise. Nor is reference intended to be had to those instruments under section one, which Gowan, Co.J., in seeking for the spirit and intent of the Act, held to be void as contrary to public policy (*b*). The discussion therefore is to be upon the question, whether there are any classes of chattel mortgages which do not require registration, and if so, is a chattel mortgage securing the mortgagee in the repayment of advances *the duration of time for such repayment being longer than one year*, one of such classes; and again, is a mortgage securing a mortgagee against his endorsement for the mortgagor or other liability by him incurred for the mortgagor, *such liability extending for a longer period than one year*, another of such classes?

An affirmative answer at once is given to the first portion of this question, by the instance of a mortgage on goods given to secure a mortgagee against a liability *to be* in-

(*a*) R. S. O., cap. 119, s. 4.
(*b*) *O'Neill* v. *Small & Sheriff*, 15 C. L. J. 114.

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curred (*c*), or an endorsement *to be* made (*d*) or a past or concurrent liability for a person *other* than the mortgagor (*e*), and the ingenuity of a conveyancer may discover many such securities which, "good before the Statute and not being provided against in the Statute, remain good, notwithstanding the provisions of the Statute" (*f*).

But what concerns us at present is the law upon the latter portions of the above proposition. Nothing can be clearer, and nothing more authoritatively settled, than that such mortgages are wholly excluded from the operation of secs. 1, 2 and 4 of the Statute. Hence it was, as Mr. Ewart writes, that the third section of the Act, 20 Victoria, cap. 3, (in which section 6 of the present Statute has its origin) was enacted; and so, further reference to the first sections of the Statute need not be had, unless it be to discover whether the same reasoning which resulted in excluding an application of these sections to mortgages contemplated by the sixth section of the Act, will not with equal force and appropriateness exclude the application of section six from the instruments under discussion.

If then section six does not apply to such mortgages, and they be good at Common Law, it follows, in answer to the question put, that they do not require to be registered, because where a security is good independently of the Statute, it will not be held void, unless the Statute clearly apply to it, and make it void (*g*).

There rests no doubt, if ever one existed, that such securities are good at Common Law (*h*), and so it remains simply to ascertain if the Common Law is superseded by the Statute.

As framed, this section "contemplates two cases, differing in character, and makes separate provision for each.

(*c*) *Mathers* v. *Lynch*, 28 U. C. R. 354.
(*d*) *Ib.*
(*e*) *Ib.*
(*f*) Per Harrison, C.J., *Paterson* v. *Maughan*, 39 U. C. R., 380.
(*g*) Harrison, C.J., *Paterson* v. *Maughan*, 37 U. C. R. 371.
(*h*) *Baldwin* v. *Benjamin*, 16 U. C. R. 52; *Beecher* v. *Austin*, 21 C. P. 334; *Walker* v. *Niles*, 18 Gr. 210; *Clark* v. *Bates*, 21 C. P. 348.

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These are:—1. The case of an agreement in writing for future advances for the purpose of enabling the borrower to enter into and carry on business with such advances, *the time of repayment thereof not being longer than one year from the making of the agreement*, and a mortgage of goods and chattels for securing the repayment of *such* advances. 2. The case of a mortgage of goods and chattels for securing the mortgagee against the endorsement of any bills or promissory notes, or any *other* liability by him *incurred* for the mortgagor *not extending for a longer period than one year from the date of the mortgage*" (*i*).

Then again, "This section applies to mortgages given to secure or indemnify against liabilities incurred by the mortgagee for the accommodation of the mortgagor, and which liabilities *do not extend for a longer period than one year from the date of the mortgage*" (*k*).

Upon a literal reading of the above language, nothing can be clearer than that the Statute, whatever it may have contemplated, embraces instruments securing such advances only as may be fixed to be repaid within one year, and likewise instruments securing against such liability only as shall not extend for a longer period than one year, and leaves unaffected and unprovided for those instruments securing advances, the repayment of which by agreement is extended over a longer period than one year, or against liabilities extending beyond a like period. And yet it has been judicially stated that instruments of the latter class are within the Act, and void when not complying therewith (*l*).

The little doubt existing as to what the Legislature meant, makes more the wonder it did not say in simple words what it really did mean. That the section was in a slovenly manner and impatiently prepared, is evidenced by the separate provision made for the cases of

(*i*) Per Harrison, C.J., *O'Donohoe* v. *Wilson*, 42 U. C. R. 333.

(*k*) Draper, C.J., *Turner* v. *Mills*, 11 C. P. 369.

(*l*) *Kough* v. *Price*, 27 C. P. 309; *May* v. *The Security Loan and Savings Company*. 45 U. C. R. 106.

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future advances and endorsements or other liabilities respectively (*m*). Without presumption, therefore, the accuracy of past dicta is fairly questioned; and is weakened by an application to this section of the rigidly literal construction hitherto so often put upon the Statute (*n*).

The section *in extenso* is as follows:—"In case of an agreement in writing for future advances (for the purpose of enabling the borrower to enter into and carry on business with such advances) *the time of re-payment thereof not being longer than one year* from the making of the agreement, and in case of a mortgage of goods and chattels for securing the mortgagee re-payment of such advances, or in case of a mortgage of goods and chattels for securing the mortgagee against the endorsement of any bills or promissory notes or any other liability by him incurred for the mortgagor, *not extending for a longer period than one year from the date of such mortgage* (and in case the mortgage is executed in good faith and sets forth fully by recital or otherwise the terms, nature and effect of the agreement and the amount of the liability intended to be created, and in case such mortgage is accompanied by the affidavit of a witness thereto of the due execution thereof, and by the affidavit of the mortgagee, or in case the agreement has been entered into and the mortgage taken by an agent duly authorized in writing, to make such agreement, and to take such mortgage, and if the agent is aware of the circumstances connected therewith, then if accompanied by the affidavit of such agent, such affidavit, whether of the mortgagee or his agent, stating that the mortgage truly sets forth the agreement entered into between the parties thereto, and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage, and that such mortgage is executed in good faith, and for the express purpose of securing the mortgagee re-payment of his advances or against the payment of the amount

(*m*) *O'Donohoe* v. *Wilson*, supra.

(*n*) See *Re Andrews*, 2 App. R. 24; *Harding* v. *Knowlson*, 17 U. C. R. 564; *Nesbitt* v. *Cock*, 4 App. R. 209; *Morrow* v. *Rourke*, 39 U. C. R. 500.

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of his liability for the mortgagor as the case may be, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor nor to prevent such creditors from recovering any claims which they may have against such mortgagor, and in case such mortgage is registered as hereinafter provided) the same shall be as valid and binding as mortgages mentioned in the preceding sections of this Act."

To simplify its reading, let the text between the brackets be eliminated, which can be done without in any way assisting or prejudicing the discussion. Then in the one case we read "in case of an agreement in writing for future advances *the time of repayment thereof not being longer than one year from the making of the agreement*, and in case of a mortgage of goods and chattels for securing the mortgagee repayment of such advances, the same shall be valid as and binding as mortgages mentioned in the preceding sections of the Act." Now what shall be valid and binding? Mortgages will, where the time of repayment of the advances is not longer than one year from the making of the agreement. But it is not said that mortgages, *when the time of repayment etc., is for a longer period than one year* shall be *invalid;* and what could have been easier than the Legislature's so saying? The Statute does not admit of even a negative inference in favor of including such instruments. The words "the time of repayment thereof not being longer than one year from the making of the agreement," do not read "that every mortgage given to secure the re-payment of advances where the time for such re-payment is longer in duration than one year shall be *invalid*, but they do read, and only read, when in connection with the rest of the section, *that a particular instrument* which the Statute distinguishes, shall be *valid.*

In the other case—that of endorsements or other liability—eliminate also the portions of the section between the brackets, and the words—"in case of a mortgage, securing the mortgagee against the endorsement of bills or any other liability by him incurred for the mortgagee, not ex-

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tending for a longer period than one year from the date of such mortgage the same shall be valid and binding"—present the self-same view. Here too it is quite clear what the Statute says shall be valid and binding, but it does *not* say, that *another* and *entirely different thing*, shall be *invalid* and *not binding*. Though there be plenty of dicta against the view that these instruments are without the Statute, yet it is curious to observe that in those cases, (with perhaps one exception) (*o*), wherein judgment upon the point has been given, the decisions principally turned upon other questions, and so the proposition now being discussed has never been fairly up for judicial opinion unconnected with any other considerations.

In *Kough* v. *Price* (*p*), Mr. Justice Galt in his judgment says, "It appears to me the Statute imperatively requires at the time when the mortgage is given it should be limited as respects the liability in duration to one year * * * I think, therefore, that on the face of the instrument it is defective. *But we are not called upon to decide the case on the construction of the mortgage itself* for," etc. So it was in *Fraser* v. *Bank of Toronto* (*q*); so it was in *O'Donohoe* v. *Wilson* (*r*); so it was in *Ontario Bank* v. *Wilcox* (*s*), and so it was in *May* v. *Security Loan and Savings Company* (*t*).

Now why was it that this section was enacted? Because it was discovered that there were various instruments given under such a state of existing circumstances, as prevented the affidavits of *bona fides* from being made consistently with the facts (*u*). Hence such instruments not theretofore coming within the operation of the Statute, were necessarily exempt from a compliance therewith.

On the same reasoning, if *now* it be that a mortgage is given under such a state of circumstances that none of the affidavits of *bona fides* required by the present Statute can

(*o*) *Turner* v. *Mills*, 11 C. P. 366.
(*p*) Supra.
(*q*) 19 U. C. R. 381.
(*r*) Supra.
(*s*) 43 U. C. R. 460.
(*t*) 45 U. C. R. 106.
(*u*) *Baldwin* v. *Benjamin*, supra.

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be made consistently with the facts in connection therewith, it follows that the instrument is without the Statute and, not being governed by its provisions, does not require registration. In the case of the mortgages under discussion, the affidavit of *bona fides* clearly could not be made under the first sections of the present Statute, although Burns J. (*v*), by charitably crediting the Legislature with thinking that some people might have scruples of conscience in making the affidavit under section 2, appeared to think that such might be done. And clearly the affidavit cannot be made under section 6 of the present Statute, for how can a mortgagee make oath "that the mortgage truly sets forth the agreement entered into between the parties" so as to bring the instrument within the Statute, when, in fact, the period of time is longer in duration than one year.

In conclusion it is not disputed that such mortgages are good at common law. It is not disputed that, the Statute failing to supersede the Common law, resort must be had to the *Lex non scripta*. It is not contended that the affidavit of *bona fides* to such mortgages can be made under the first sections of the Act. And it is here submitted that the sixth section not applying to the instruments discussed, they rest upon common law doctrines for a construction, and are valid irrespective of the Statute. Statutes must be read as we find them, leaving it to the Legislature to amend them, if the reading be not that which the Legislature intended (*w*). If we read the section being discussed as we find it, there can be no doubt the Statute makes valid certain particular mortgages upon failure of certain particular conditions, and as "the legislature must be intended to have known the meaning of the words used, and to have designed the omission of words where a plain omission is apparent," other words cannot be judicially imported to give negative legislation, (if it is even such) the force and effect of affirmative enactment (*x*).

J. A. B.

(*v*) *Baldwin* v *Benjamin*, (supra at p. 57),
(*w*) *Morrow* v. *Rourke*, supra.
(*x*) See *Lane* v. *Bennett*, 1 M. & W. 70; *Battersby* v. *Kirk*, 2 Bing. N, 584.

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THE VALUE OF THE HUMAN BODY AND BONES.

[*Concluded*]

Legs have often been considered by juries and Judges. We will submit to our readers the values at which these nether limbs have been held in England, New York, Massachusetts and Canada—cases of men's legs, women's legs, (we trust the printer will put these words in nonpareil type,) and a baby's leg. Sharp boys and girls of the Lord Macaulay style can then readily find the probable value of their own legs by simple proportion. A New York Court agreed with a jury in considering $12,000 not too much for Mr. Rockwell, who—through an injury—was confined to bed for six weeks, (suffering great pain,) and unable to attend to business for several months, and was left permanently lame, after having paid from $1200 to $1500 for doctors' fees and such extravagances. (*Rockwell* v. *Third Avenue Ry.*, 64 Barb. N. Y. 430). Apparently the value of lower limbs has gone up in the New York market, for some time since it was held that even $6000 was an excessive sum to give for a broken leg which got well (to be sure) in about eight months; and the defendants got a new trial, to enable them to persuade the jurymen that such was a fancy price. (*Clapp* v. *Hudson Ry.*, 19 Barb. 461.) In Wyoming $10,000 was considered by the Court to be an excessive compensation for a compound fracture of a leg. (*U. P. Ry.* v. *House*, 1 Wy. Ter., 27). And even in Iowa, where $4000 had been given for a broken leg, the court reduced the sum to $2500. (*Lombard* v. *Ch. &c. Ry.*, 47 Iowa, 494).

In Ontario some twenty-five years ago, a jury gave one Batchelor £6178 11s. 7d. for the loss of a leg (and a few other hurts); "that precious leg of Miss Kilmanseg that was the talk of 'Change—the Alley—the Bank—and with men of scientific rank, made as much stir as a fossil shank of a lizard coeval with Adam," could not have been much more valuable that the twelve jurors thought this. But

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the Court said that it did not appear to them that the jury had exercised that sound and reasonable discretion, in awarding such heavy damages as the law requires of them. And so a new trial was granted: but only upon payment by the guilty party of £500 into Court, which sum Batchelor was to be at liberty to take out, without prejudice to his claim for damages *ultra* at another trial. Their Lordships were careful to say that they did not consider £500 sufficient to cover the damages sustained: in other words they deemed a leg worth more than $2,000. (*Batchelor* v. *B. & B. Ry.*, 5 C. P. 127). In 1873 a butcher, earning $50 a month, fell into a culvert made by the Great Western Railway in the highway, and broke his leg in two places. In consequence he was obliged to keep his bed for four months and was hobbling about on crutches at the trial—six months after the accident. The leg was permanently shortened, and the doctor's bill proportionately long. The verdict was $2,000; and Richards, C. J., on an application for a new trial, said "on the whole, we cannot say the damages, $2,000, are so excessive as to justify our setting aside the verdict on that ground;" and the Judges did not set it aside on any ground. (*Fairbanks* v. *G. W. R.*, 35 U. C. R. 523.)

A teamster's leg is not thought much of by his fellow countrymen: one of that calling in Ontario had his limb broken owing to his falling off his load and his load falling on him, through a defect in the highway. He was confined to the house for some six weeks—could do nothing for some months—and then found himself so injured that he had to give up the employment of teaming. The jury, to mend matters, only gave him $300, which the Court let him keep. (*Bradley* v. *Brown*, 32 U. C. R., 463.) Strange to say, some years before the teamster's leg was broken, in the same part of the world, a deck hand was assisting in unloading a schooner at a wharf; the pier was out of repair, and Johnson (the mariner) broke his leg. He was awarded £250 for his pains and damages, and the Court refused to order a new trial. (*Johnson* v. *Port Dover etc.*,

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17 U. C. R., 151). In England poor Armytage fared even worse than Bradley; he had his *thigh* broken by Haley's servant when driving an omnibus. The surgeon was called in and gave evidence that it was doubtful whether A. would not always be lame, and he had been paid £10 for his attendance. The jurors, however, gave a verdict of one farthing damages! Armytage was rather naturally dissatisfied with the amount, and asked the Court for a new trial to try to get more; he got the second chance. Denman, C. J., remarked, "a new trial on a mere difference of opinion as to the amount of damages may not be grantable, but here are no damages at all." (*Armytage* v *Haley*, 4 Q. B., 917.) The jurymen in this case must have been of the same stripe as those miserable wretches who in an action, under Lord Campbell's Act, for damages for the death of a husband and father, gave one pound to the sorrowing widow and ten shillings each to two fatherless little ones, as compensation. (*Springett* v. *Balls*, 7 B. & S., 477.)

One Greenland was on board "The Sons of the Thames," sailing between Westminster and London Bridge, and he was standing on the deck near the bow. The "Bachelor" collided with "The Sons" and the concussion caused the anchor of the latter steamer to fall from its place, and in falling it came against Greenland's leg which broke beneath the blow. He sued the owners of the "Bachelor," and recovered £200 damages. (*Greenland* v. *Chaplin*, 5 Ex., 243) Tebbutt was standing at a railway station waiting for his baggage, and a porter in passing with a truck laden with trunks let a portmanteau fall off and injure T.'s leg. The jury fixed the damages at £300, and the Court would not interfere. (*Tebbutt* v. *B. & Ex. Ry.*, L. R. 6 Q. B., 73.)

Mrs. Feetal was a Massachusetts lady and a spiritualist. One Sunday she went to a camp-meeting of her sect, at which, among other wonderful things, a Miss Ellis was put in a box with her hands tied, and when the box was opened a ring that had been on her finger, was found on the end of her nose. On her way home by train, Mrs. F. had her leg

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broken, and on suing the Company, got $5,000 damages. The Company objected strongly, on the ground that the accident happened on Sunday, and the lady had not been at divine service; but the Court would not interfere. (*Feetal* v. *Middlesex Ry.*, 109 Mass., 398).

A Canadian lady in the little town of Dundas stepped into a hole in the board walk, fell and broke her leg a little above the ankle. The hole was variously estimated at from sixteen to eighteen inches long, and from five to seven in width, but at the time of the accident was partly hidden by the snow. The defect had existed for some time. The jury gave a verdict of $800 (the doctor's bill was over $100). A new trial was granted, as it was by no means clear that the plaintiff had been guiltless of negligence, or that the defect was such as to make the corporation liable. (*Boyle* v. *Corporation of Dundas*, 25 C. P. 420). The next jury estimated Mrs. Boyle's damages at $150, and her husband's (for medical attendance and such like) at $150 more. The Chief Justice remarked that these damages were moderate: we entirely agree with his Lordship. (27 C. P. 129.)

Mrs. Siner was more fortunate in obtaining damages from the jurors than her Canadian sister, although not so badly damaged. Her train—we mean the train in which she travelled—that is, the one that carried her, not the one which she carried—was too long to permit the car in which she was, to reach the platform: she stood on the front step, took hold of her husband's hands and jumped to the ground, and in doing so strained her *knee*. The jury gave her £300, but the Judges were ungallant enough to say that the injury was all her own fault, (she did not use the footboard,) and would allow her nothing. (*Siner* v. *G. W. R.*, L. R., 3 Ex. 150: 4 Ex. 117).

A woman in Illinois had her knee injured. After three years she was not quite recovered, although she could walk naturally and gracefully, though one leg was smaller than the other, yet it probably was not permanently injured: she had not suffered much and had lost no money. *Held*, $2500 excessive. (87 Ill. 125).

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In Connecticut a baby two years old was run over by a train, and had a *leg* and an *arm* amputated in consequence. The jury tried to make things right by a verdict of $1800; how much for each member we cannot say. Here the question of imputable negligence arose: but with that doctrine we are not now concerned. (*Redfield* on Railways, Vol. II, p. 243).

A *bite* on a woman's leg was valued by an English jury at £50. A middle sized black dog of the terrier kind, about eleven o'clock one night bit a Mrs. Smith, a laundress, at a railway station. The canine had been haunting the depot for some hours; at 9 p.m. it had torn a lady's dress, at 10.30 it had attacked a cat, and been kicked out by a porter, and shortly after it worried Mrs. Smith's calf. The verdict, however, was set aside, the Court deeming that the Company had not been guilty of any negligence in allowing the presence of the dog. (*Smith* v. *G. E. R.*, L. R. 2. C. P. 4).

The Court held that $1950 was not too much for Crawford to pay for putting a buckshot into Cameron's leg and a rifle ball through his left lung. (88 Ill. 312).

For a sprained *ankle* $2500 is excessive. Spicer was a mail agent on a Chicago line, and fearing a collision jumped from a passenger train while it was in motion; in doing so he sprained his ankle and consequently was confined to the house long enough to lose two weeks' salary (at the rate of $1080 per annum). The Court considered the jury far too liberal. (*Spicer* v. *Chicago, etc. Ry.*, 29 Wis. 580). A truck went over the ankle of a boy of fourteen, and through the improper conduct of the surgeon called in to attend it (as the plaintiff's witnesses swore) the foot mortified and had to be amputated. The jury gave the boy a verdict for nominal damages and the Court would not grant a new trial on account of the smallness of the damages because the Judge who tried the case was not dissatisfied with the verdict. (*Gibbs* v. *Tunaley*, 1 C. B. 640).

We do not know exactly in what part of the body lie hid one's "feelings." Wherever they are, they are not much thought of; and even a "shock to the feelings" of a wife by

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her husband's death cannot be considered in awarding damages. (*Nashville &c. Ry.* v *Stevens*, 9 Heisk., 12).

In the good old days of the Saxons the *bot*, or penalty, for the smallest disfigurement of the face was three shillings; the same for breaking a rib; the breaking of a thigh was twelve shillings; the robbing a man of his beard, twenty shillings; and a front tooth was valued at six shillings. (*Taswell-Langmead*, p. 41).

And now a word or two as to what should be taken into account by a jury in estimating the amount of damages to be awarded for personal injuries. The American courts have held, that the loss of time caused by the injury is proper to be considered. (*Jones* v. *Northmore*, 46 Vt. 587). The age and the situation in life of the injured one; the expenses incurred; the permanent effect upon the plaintiff's capacity to pursue his professional calling, or to support himself as before times, (*Whalen* v. *St. Louis &c. Ry.*, 60 Mo. 323; *Indianapolis &c.* v. *Gaston*, 58 Ind., 224), are also essential factors. Bodily pain, too, is to be considered and compensated for; and so much of mental suffering as may be indivisibly connected with it, but mental anguish and agony cannot be measured by money—the Courts consider—and there is no established rule authoritatively commanding such a futile effort. (*Johnson* v. *Wills*, 6 Nev., 224). It is difficult to measure even excessive pain against money. (*Campbell* v. *Portland Sugar Company*, 62 Me., 552; *Redfield* on Railways, Vol. II., p. 286). In fact, they say that one should get compensated for all injuries that are the legal, direct and necessary results of the accident. (*Curtis* v. *Rochester & S. Ry.*, 20 Barb., 282). Loss of anticipated profits from real estate on land was held a proper subject for compensation to a land speculator. (*Pa. Ry.* v. *Dale*, 76 Pa. St., 47). Disfigurement was also held a proper point to be considered. (*The Oriflamme*, 3 Sawyer, 397).

The late case of *Phillips* v. *The South Western Railway Company*, fully enunciates what, in the estimation of the English Judges, are to be considered in fixing the amount

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of damages. Cockburn, C. J., on a motion for a new trial for insufficiency of damages, said, that the heads of damages were the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure; the pecuniary loss sustained through inability to attend to a profession or business; as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life. (L. R., 4 Q. B. D., 407).

In the Common Pleas Division on a motion, after a second trial, to set aside the verdict for excessive damages, Grove J. said, "The Plaintiff is entitled to receive at the hands of the jury, compensation for the pain and bodily suffering which he has undergone, for the expense he has been put to for medical and other necessary attendance, and for such pecuniary loss as the jury (having regard to his ability and means of earning money by his profession at the time) may think him reasonably entitled to." "Damages are awarded as a compensation for the injury and loss sustained; they are not to be given from motives of charity and compassion." Lopes, J. was of the same opinion. And in the Court of Appeal, Bramwell, L. J. said that he was, in common with other Judges, accustomed to direct juries as follows :—"You must give the plaintiff a compensation for his pecuniary loss, you must give him compensation for his pain and bodily suffering; of course, it is almost impossible to give an injured man what can be strictly called a compensation; but you must take a reasonable view of the case, and must consider under all the circumstances, what is a fair amount to be awarded to him." Cotton, L. J. remarked that a plaintiff is not to receive an annuity for the rest of his life calculated on the amount of his income; but that after taking into account the chances affecting the income, the jury are to say what, in their opinion, is a fair compensation for the disability, whether permanent or temporary, under which a plaintiff comes of

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practising his profession and earning the income which he previously enjoyed." (L. R., 5 C. P. D., 280). In this case Phillips, who was a physician of middle age and robust health, making £5000 a year, was so injured that for sixteen months, the time between the accident and the trial, he was totally incapable of attending to business; his health was irreparably injured to such a degree as to render life a burden and a source of utmost misery; he had undergone a great amount of pain and suffering, and the probability was that he would never recover. Yet, the first jury only gave him £7000. This verdict was set aside as inadequate. The second jury awarded £16,000, and the Court refused to consider it excessive. In fact, Bramwell, L. J., said that the only misgiving he had was whether the jury ought not to have given more. (L. R., 5C. P. D., p. 287).

R. VASHON ROGERS.

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THE JUDICATURE BILL.

This bill has been in our hands for some time, but we have deferred making any review of its provisions until it shall have taken a definite form, since Proteus-like, it alters its shape and eludes our critical grasp. Still, it may not be amiss here to say a few words with reference to the general policy of the measure, since it contemplates the attainment of an end so important as the complete subversion of the existing systems of procedure, and the introduction of a code which, in many of its features, is entirely new to both branches of the profession, and which is alien to the spirit of the laws hitherto administered by the Courts of Common Law.

In an era of high pressure evolutionist theories, it will sound like a truism to assert that the natural process in all things is growth. But when applied to the Common Law, as at present aided by a legislative policy, which has done much to substitute adaptibility to circumstances for that historical inelasticity which begat the Court of Chancery, this proposition, susceptible as it is of absolute proof, does not seem to commend itself to the framers of the bill. True it is that those institutions best perform their functions, and are most admirably adapted to the peculiar needs of the community to which they belong, which are a national outgrowth of the history of the people. We laud the British constitution because in its course of development through our strivings for political liberty, it has gained that elasticity which is wanting in a constitution limited by the words of a Declaration or an Act of Parliament, which are apt to fail at every severe crisis. While we admit the applicability of this principle of natural development to the science of government, we fail to see the full extent of its truth. We overlook the close similiarity, nay the identity in the growth of political institutions and of judicial procedure; that as the former modify themselves to the political ideas of the community, so the latter adapts itself to the special sys-

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tem of laws in force in that community. And, as a corollary to what has been said, we may conclude that any code of procedure which has not the stable foundation of experience will be found utterly unfitted for the purposes intended, and that the Courts, by assimilating what is suitable, rejecting what is foreign, and supplying what is omitted, will be compelled to mould and develop a practice of their own, which in the end will be no more efficient than that superseded, but which in its formation, will inevitably cause great uncertainty in the administration of justice, and serious delay and expense to suitors. And this will be the effect of the Judicature Act. Without expressly abolishing the ancient practice of the Courts of Law and Equity, it establishes a system differing from both, leaving any slips or oversights that may have been made in framing it to be remedied and supplied from those superseded. The result is easily forseen. We have a new, incomplete, and untried code. We have two diverse systems on which to rely in cases of doubt. The code is, therefore, viewed from two opposite stand-points and supplied from antagonistic sources. The confusion that must inevitably follow is apparent. Nor is this mere speculation. The English system of Judicature on which our new Act is, in some measure, based, has been sufficiently tried to be found wanting. Instead of that expedition and despatch in legal business, which the public were led to expect from the new code of procedure it has caused unprecedented delay in the determination of causes. Some eight hundred cases are on the list in Middlesex alone, awaiting disposal; and judging from the remarks of Mr. Chalmers, the editor of "Wilson's Procedure Acts," the system is likely to bring about a state of affairs similiar to that resulting from the famous decision of Walter the Doubter. The people have grown tired of litigation since the hope of having their disputes settled has vanished. And all this confusion and delay have resulted from a disregard of the principles laid down at the commencement of this article, from a misconception of the

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true relation subsisting between the Equity system and that of the Common Law.

Owing to the recent adoption of the principles of Equity in the Courts of Law, or perhaps resulting from the same cause as that adoption, a very widespread opinion has gone abroad that everything connected with the Common Law principles, pleading and practice, is essentially vicious; that a fierce and obstinate war has long been waged between the two opposing systems, that Equity has at last triumphed, and that all belonging to the vanquished should be utterly swept away. But surely this is a very shallow and a very incorrect view to take of the matter. Equity properly is only suppletory to the Common Law, not subversive of it. The ancient system had matured and become unyielding before the dawn of modern civilization, which developed for itself a court and a jurisprudence suited to those ever increasing needs which the Common Law failed to meet; but that Court never assumed jurisdiction over cases in which the Common Law gave adequate relief; and indeed the complex procedure which it found necessary to adopt in order to give effect to its comprehensive remedies, was wholly unsuited to those simpler classes of cases over which the Common Law still retained exclusive control. The evils, which naturally and necessarily resulted from this state of affairs, and which it has been the aim of modern legislation to remove, were, that suits commenced at law were often restrained by the Courts of Equity, and that preliminary steps had frequently to be taken in Equity in aid of actions at law; rendering litigation not only tedious but ruinously expensive. It was manifest that, as far as possible, complete lief should, i every case, be given in one suit, and bef one tribunal; and for the purpose of effecting this, ma) Statutes have from time to time been passed, of which the most important is the Administration of Justice Act. That Statute enacted that the Courts of Law and Equity should be auxiliary to one another, and empowered the former Courts to make such order and decree as the equitable rights of litigants should

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require. *But it did not attempt to define the means by which those ends should be carried out.* It left it to the Judges to work out a procedure for themselves. The existing systems remained, but they received a new direction. The barriers which had prevented the attainment of complete justice in a single tribunal were removed, and all that was required to develop a procedure of high efficiency, was a judicious use on the part of the Judges of the discretionary powers conferred on them to that end. The Common Law procedure might still be retained in those cases in which its simple remedies suffice, and at the same time it became capable of expanding so as to give relief as comprehensive and complete as Courts of Equity could do. And what has been the result? Has the Administration of Justice Act proved such a failure that this new measure must needs be introduced? On the contrary, it has been eminently successful in removing the evils intended, and the only evils really existing. The Courts of Common Law have proved themselves capable by virtue of that Act, of decreeing specific performance, issuing an injunction restraining ejectment, and of directing parties to execute conveyances. *Westgate* v. *Westgate*, 28 C. P., 263. By parity of reason, they may exercise any other of the functions of a Court of Equity *as often as circumstances may require;* and at the same time they retain the power of assessing damages for breaches of contract without resorting to the tedious process of the Court of Chancery, which the measure before us practically introduces in all but the simplest cases.

Such was the policy of our legislators eight years ago. From being faithful copyists they dared to think and act for themselves. While in England jurists and statesmen were vainly endeavouring to solve the judicial problem, and were devising a measure destined to throw the whole judiciary into confusion, our statesmen hit upon the solution. As if unconscious of their discovery, they show so little confidence in their own judgment that the adoption of a different course by the English Parliament has

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caused them to waver. Whatever has induced it, the change in policy is, we think, ill-advised; both because of the confusion that must inevitably result and because the measure by its wholesale condemnation of the Common Law System, and its abject worship of "Equity" seems to owe many of its enactments to prejudice.

OSGOODE LITERARY AND LEGAL SOCIETY.

Previous to the meeting held on 22nd January, Mr. Thomas Hodgins, Q. C., read an interesting paper to the members on the maxim "Equity follows the law."

The regular proceedings consisted of a competition in impromptu speaking. All competitors were excluded from the room, when a jury was empannelled from the audience and the speakers were called in in rotation, the subject being handed to each as he entered. All spoke from the same subject, each being allowed ten minutes for his speech, but no time at all for preparation, notwithstanding which several capital speeches were made. The following members competed :— Messrs. Knight, Gilmore, Donahue, O'Brian, O'Meara, Leonard, Cox, Munson, Cooper, Carter, Stuart, Cavill, Bolster, Kean, Macdonald, Wilson and Taylor. At the close, the jury decided that Mr. G. Macdonald was entitled to the first prize, and Mr. Donahue to the second. The prizes were valuable books.

At the meeting held on 29th January, the chair was taken by Mr. Nelson. The subject for discussion was, "*Resolved*, That an Act should be passed prohibiting all others than lawyers acting as conveyancers, excepting in the case of wills when necessity requires it." The affirmative was opened by Mr. Symons, supported by Messrs. Bolster, Hamilton and Hearne. The negative was sustained by Messrs. Haight, Washington, McCarthy, W. A. Taylor, W. Burgess, and Middleton. After reviewing the arguments,

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the Chairman decided in favour of the affirmative. The meeting then adjourned.

The thirteenth Public meeting was held on Friday, 4th February, in the Common Pleas Court Room, at Osgoode Hall, the use of which had been kindly granted by the Attorney-General and the Judges.

There was a large attendance of ladies, Members of the Bar, students, and their friends.

The chair was taken by the Hon. the Chief Justice of the Common Pleas, and shortly after eight o'clock the meeting was opened with a reading from Mr. T. A. Gorham, entitled "Thrilling Sketch," by Salathiel. The subject chosen for the debate was:—"*Resolved*, That it would be advisable to effect a treaty with the United States, whereby the Customs duties, as between the two countries, should be abolished; similar tariffs imposed upon imports from other countries, and the revenue so derived divided according to population."

Mr. A. STUART for the affirmative, stated that at no time in her history had Canada been so prosperous as when the Reciprocity Treaty was in force. He showed the immense increase in her trade while the Treaty was in force, and its immediate decrease after the abrogation of the Treaty. Commercial union would benefit her in many ways, and would not at all tend to create a policy of separation from England.

Mr. G. G. MILLS for the negative, said that the resolution did not involve the question of reciprocity but of commercial annexation. Before such a change could be considered beneficial to this country the present state of her foreign trade should be considered. The United States buy largely of Canada and she exports largely to England and other countries. In uniting with the States, Canada would thus be erecting a barrier against her future prosperity. Commercial union would cause the aims, objects and sympathies of both countries to be one, and would eventually lead to political annexation.

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Mr. W. J. Cooper for the affirmative, contended that the geographical position of the two countries was such as to encourage a union of the mercantile interests.

Mr. T. H. Gilmore, for the negative, thought that such an arrangement would destroy Canada's shipping interest, which now stands fourth in the World's marine.

After the leader of the affirmative had replied briefly, His Lordship summed up the arguments, and on their merits decided in favour of the affirmative.

At the meeting held on Feb. 12th, Mr. E. Douglas Armour gave a short address on "Advocacy," containing a few hints to those who anticipate becoming Members of the Bar. This being one of the dates on which motions to amend the Constitution could be made, there was no debate as the evening was spent in discussing the motions brought forward

LAW SOCIETY OF UPPER CANADA.

The following gentlemen were called to the Bar, during Hilary Term, 1831. The names are arranged according to the number of marks respectively obtained.

W. F. T. Dickson (Gold Medallist), J. A. Allan and W. Nesbitt (Bronze Medallists), with honours; T. D. Cumberland, P. Drayton, J. B. McKillop, C. Campbell, A. Dawson (with oral), J. Doherty and G. Gibson (equal), P. Mulkern, W. White, T. C. L. Armstrong (with oral), J. P. Curran, J. Harley, R. Boultbee, H. Buchanan, G. A. Skinner, W. A. Wilkes, D. E. Shepperd.

The following gentlemen obtained certificates of fitness. Their names are similarly arranged.

J. A. Allan, W. F. T. Dickson, H. E. Crawford, W. Nesbitt, T. D. Cumberland, P. Drayton, J. B. McKillop, J. Doherty, C. Campbell, W. B. Carroll, G. H. Smith, A. O'Heir, W. White and H. Buchanan (equal), W. A. Bishop and P. Mulkern (equal).

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EDITORIAL REVIEW.

Political Justices and Political Justice.

The *Central Law Journal* of the 21st January, 1881, touches editorially upon and calls for a reform of the present system of carrying on business in the Magistrates' Courts which we believe perform the same functions as our Division Courts.

Touching the office of magistrate, we read: "In many, if not all the States, it is not a necessary qualification for the office that the candidate should be a lawyer, and second that in most instances it is provided by law that the compensation of the Justice shall be made by the means of costs, to be paid by the unsuccessful litigant; whereby it comes that the judgment is usually against him that is best able to pay the costs. We think that Justices should be members of the Bar, and that they should be compensated by fixed salaries for their services." The article continues:—"We are well aware that any plan for carrying these reforms into effect would be met by the objection that they are impracticable because the Justices and the constables are a political power in the land. * * * It seems to be only a question whether the Bar, who alone are qualified for such a task, are to lead and direct the movement, or are to be driven by it." This is very significant for us, coming from a quarter in which "politics" occupy such a prominent position, and at a time when the same policy which transferred the allegiance of the clerks and bailiffs of the Division Courts, to the Government of the day, is developing itself in similar though more extensive and important legislation. We should take a timely lesson from the experience of our neighbours and beware of proceeding too far in this direction.

The writer can point to a magistrate of the political persuasion who tried a case of common assault, heard the evidence and placed the depositions before one of Her

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Majesty's Counsel, who advised him to convict. The learned Justice paid the fee, disregarded the opinion, and dismissed the case, basing his judgment upon the ground that the title to land was in question. The depositions showed that the defendant had kicked the complainant out of a piece of land which the defendant claimed the prosecutor was trespassing on! This able justice still holds his Court in a populous town where there is no lack of barristers.

An instructive case on the subject of magistrates' fees and how to charge them, may be found reported in 31 C. P., p. 151, where the magistrate, having charged the costs in full against each one of four persons whom he convicted, unexpectedly found himself in possession of a handsome surplus for his day's work, the disposition of which was not provided for by Statute, and which he therefore, in the exercise of a sound discretion, appropriated to his own use. It is needless to multiply instances as they are frequent enough to show that a man whose sole qualification for an office, the incumbent of which should be distinguished for strict impartiality, consists in the fact that he has been a faithful partisan.

Unprofessional Conveyancers.

We have received a communication from a solicitor on this subject, in which he instances one more of the many men without professional education, who find fellow-men foolish enough to entrust their business to them. The practice is so wide-spread, that almost every attorney can point to more than one case within his own knowledge. It is argued by some, that, as many practitioners suffer from this practice, some measure of protection ought to be accorded to the profession as a body. On the other hand it is alleged, that, as a mass of litigation is produced by attempts at conveyancing made by these men, a large number of the profession eventually reap a corresponding or greater benefit from them. It would be practically impossible to obtain statistics of the losses and benefits occasioned by the practice, and without them it cannot be said that

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the profession as a body is a loser by it, requiring protection. The fact that the majority of attorneys appear apathetic in the matter, is to our mind an evidence that a comparatively small number are affected by it, and that as a body the profession is not injured to any appreciable extent. In fact, as much has been admitted in correspondence which has been published from time to time in the *Canada Law Journal*. But it is this apathy that is galling to the minority who do suffer. If it be true that litigation is engendered by unprofessional conveyancing, it is the foolish public which requires protection against itself, and a practical measure restricting the performance of all work which requires any knowledge of the law to those who are skilled in it, would receive the hearty support of every sensible man. Whether it is the profession or the public that require protection, it is certain that the practice is a bad one, and is productive of evil, but we must wait for the remedy until theoretic and experimental legislation gives way to practical law-making. We here register our objection to the use of the meaningless expression, "unlicensed conveyancers." As long as a license is not necessary to enable a person to practice conveyancing, we presume laymen are within the law when they draw conveyances.

r. Barron's Article.

We print this month another article on the subject of chattel mortgages where the term exceeds a year. The practice of making chattel mortgages is so prevalent, and the law so uncertain on this subject, that we think no apology is necessary for a second opinion on the subject. On the contrary, we are sure that our readers will be glad to hear the views of a gentleman, who has made the subject of Bills of Sale a special study, and whose work has called forth an encomium from the Reviewers across the Atlantic. It is to be regretted that a mistake occurs in the seventh line from the end, which was not discovered till the first sheet had been worked off. For "valid" read "invalid."

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BOOK REVIEWS.

Constitution of Canada ; The British North America Act, 1867; its interpretation etc., by JOSEPH DOUTRE, Q. C., of the Montreal Bar. Montreal: John Lovell & Son, 1880.

This is a book for lawyers, a book for statesmen, a book for editors, a book for all public men in Canada, and a book exclusively for none of them. It has a digest of cases here, a historical sketch there, now a treaty, again a political speech, and here and there a little diplomatic correspondence. In running hastily through its pages the attention is arrested by the close reasoning of a learned Judge, his weighing of precedents, his cautious progress towards the conclusion—pointing you always to the end, but meanwhile warning you to "hasten slowly." The conclusion reached, the mind bursting from the fetters of precedent, is refreshed by a plunge into the fresh, clear and flowing English of the "Bystander." A few pages more, and one almost begins to gesticulate while glancing over a vigorous scrap from one of the speeches of the late Hon. Geo. Brown, on Confederation. A little political economy is added to the various reading, and the average lawyer finally sits down to spell out the result and frame corollaries from a long digest of cases on the complex jurisdiction created by the B. N. A. Act.

A fund of useful knowledge is found between the covers, but the *dicta* of Judges, reports of cases, the opinions of statesmen, excerpts from treaties and statistics, are all brought into hotchpot. While almost every source of knowledge has been visited for the purpose of bringing light to bear on the constitution of Canada, the only regret is that, failing a more methodical arrangement of the references; there is not that indispensable ingredient of a good book—a complete index. When we speak of the arrangements not being what might have been expected from such a persevering man as the author, we may be

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accused of speaking from the practitioner's point of view solely. Classification is indispensable to a lawyer; and a book without a good index, is to him a large city without a street directory.

There are many places in which the arguments of an eminent man would have been of material assistance in reading the Act; but we are constrained to pass on, with an occasional expression of regret at not having obtained the author's views.

A most useful fund of information will be found under the clauses defining the powers of the Dominion Parliament and the Provincial Legislatures, respectively. The author has collected with great care, numerous cases, English, Canadian and American upon the subjects here legislated upon, and upon the powers conferred upon the different Legislative bodies.

No less than eighty pages are devoted to an elucidation of the phrase "Property and Civil Rights," and all the authorities seem to be collected therein.

A table of Extradition Treaties between Her Majesty and Foreign Powers will be found at page 364, followed by a list of explanatory cases.

The Quebec Resolutions and the Constitution of the United States of America, complete the volume.

The book is the result of great perseverance, and will be found most useful for reference.

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COMMITTALS IN DIVISION COURTS.

To the Editor of the Canadian Law Times:

SIR,—I wish, through the medium of the *Canadian Law Times*, to draw the attention of the profession to the construction put upon sec. 60 of the Division Courts Act of 1880, amending sec. 183 of the Division Courts Act. By the amendment, the word "twice" is struck out of sec. 183. Then the liability to committal is conditional upon either one of two things, *wilful non-attendance*, or *failure to attend after being duly summoned*. The Judge is, of course, to determine whether or not either of the conditions has happened. If either the one or the other exists the liability to committal is established. The Legislature, no doubt, intended that the failure to attend after being twice summoned, should be held to be wilful non-attendance by implication and a contumacious resistance of the process of the Court, and so an equivalent of the other condition, express "wilful" non-attendance, which may occur after the defendant's being *once* summoned.

The section is somewhat awkward as it stands, because the element of non-attendance is all the Judge has to consider, and the first condition mentioned is mere surplusage and might have been struck out altogether. It is an instance of hasty, ill-considered legislation, but nevertheless the section must be construed on logical principles as it stands. Some of the Division Court Judges read the amended section just as they read it before, and still require a second summons before ordering a committal, but have not, as far as I am aware, given their reasons, for their decision which seems founded upon leniency to the judgment debtor rather than upon a strict construction of the Statute. I surmise, however, that those Judges who have refused to recognize the amendment, build their judgment upon the *wilfulness* of the non-attendance which they may hold to be best evidence by failure to attend

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after being *twice summoned*. This, however, is proceeding upon the false hypothesis that *wilfulness* is a necessary element of the condition upon which liability to committal arises. I have shown that it is not so, or to put it briefly, the secondly mentioned condition as the Act now reads, is always present in the firstly mentioned condition, in other words they are identical, excluding the *wilfulness*, but the condition of non-attendance is sufficient of itself to establish the liability; therefore, the Judge should, in no case, require to be satisfied of the *wilfulness* in non-attendance.

I trust that a careful perusal of the section, by the Judges, will lead them to this construction of the section—the only logical one in my humble opinion.

Yours, &c.,

SOLICITOR.

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REVIEW OF EXCHANGES.

The Central Law Journal.—28th January, 1881.

Effect of Destruction of Buildings on Contract for sale, by E. A. MARSHALL. The writer points out the anomalous attitudes of the Courts of Law and Equity—the latter "enforcing what seems a hard bargain," by following the well known principles of Equity that the land is the property of the vendee from the moment the contract is sealed—while the law resorts to equitable principles to relieve the vendee. The seeming injustice of Equity is explained by putting the case of a rise, instead of a depreciation, in the value of the property after contract, but before conveyance.

A striking case on the subject is that of *Stephenson* v. *Bain*, 8 Pr. R. 258 following *ex parte Minor*, 11 Ves. 559, and *Twigg* v. *Fifield*, 13 Ves. 518, where a purchaser under a decree signed the usual contract to purchase, and paid his deposit. The next day the buildings were burned down. *Held* by Proudfoot, V.C., reversing the decision of the Referee, that the loss would not fall upon the purchaser, as the interest contracted for did not vest in him till the report on sale was confirmed.

The American Law Review.—February, 1881.

Deviation, by SIMON GREENLEAF CROSSWELL, is a review of English and American authorities, citing a New Brunswick decision.

Mortgages of Future Personal Property, by S. T. DOUGLASS, shortly states the effect of many American, and some English, authorities.

The Southern Law Review.—December, January, 1880-1.

Modern Legislation touching Marital Property Rights, by HENRY HITCHCOCK, states succinctly the *status* of the married woman under the common law, and reviews the legislation on the subject. The writer says, "It is obvious that the actual significance and tendency of these statutes is to be measured not so much by the immediate effect of this or that provision, or the existence of this or that evil under the old law which it is designed to prevent, as by the extent of its departure from that conception of marriage as a *status*, and of the relation to society and to each other of those who enter into it, upon which the old law was based."

The course of modern legislation is but a continuation of that historical movement in the marriage relationship from *status* to contract so ably

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traced in *Maine's* Ancient Law. The policy of proceeding too far in this direction is questioned in the article under review, which concludes as follows:—"If the common law erred in assuming that all husbands will always be provident and unselfish, always the stronger and the wiser, and always gentle in their strength, it is scarcely a better law which would invite every wife to regard and treat her husband's interests as separate and distinct from her own, and increase the temptation to those completely selfish strifes, proverbially bitterest among persons most nearly allied. It can hardly be wholesome or wise for the State to inculcate, by general and positive law, the doctrine that whatever burden the husband may bear, the wife should be privileged and protected from sharing; that she may judiciously postpone family cares and duties to the ventures and anxieties of a sole trader, or prudently relieve the tedium of the domestic partnership by a business alliance with some shrewd capitalist. Certain it is, that no legislation can elevate or purify society, which even remotely tends to impair the sacred confidence of the marriage relation, or to destroy its unity and peace, by suggestions and temptations most adverse to that loving and unselfish spirit which, alike for husband and for wife, converts into blessings even the burdens jointly borne."

Power of Municipal Corporations to Borrow Money, by JOHN F. DILLON, treats of their power to borrow, "particularly as to the existence of an *implied or incidental* power." A number of English and American authorities are cited.

Expert Evidence--What it is, by F. J. VAN VORHIS. The writer calls attention to the distinction between a *fact* when stated by a scientific witness, whose knowledge of it has been gained by study and professional observation, and an *opinion* formed, or a conclusion drawn by him from the consideration of facts submitted. He illustrates his meaning by supposing that a medical witness were asked the question, "How many bones are there in the forearm?" The answer to this would be a statement of a *fact;* and he shows that the answer would be no less a fact if the question had been, "What, in your *opinion,* is the number of bones in the forearm?" Expert evidence is deferentially defined as "the expressed opinion of the witness regarded by the Court as competent to express an opinion, and permitted so to do, concerning the conclusion or conclusions to be drawn from facts shown to the Court or Jury."

The Criminal Law Magazine.—January, 1881.

The Construction of Penal Statutes, by FRANKLIN FISKE HEARD, cites English and American authorities.

The Irish Law Times—1st January, 1881.

Railway Bye-Laws Respecting Passengers' Tickets.—I.—A useful article pointing out the position of passengers buying special return tickets; and showing the extent to which railway companies may go in making bye-laws. A number of cases cited, including some American authorities.

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The Irish Law Times.—8th January, 1881.

Acts by Corporations Requiring Malice in Order to be Actionable.—Passing over O'Connell's oft-quoted saying as hardly polite enough to justify a repetition, the writer gives the quaint opinion of Manwood, C.B. :—" That they were invisible, immortal, and that they had no soul, and therefore no subpœna lieth against them, because they have no conscience or soul. A corporation is a body aggregate; none can create souls but God; but the King creates them, and therefore they have no souls. And this was the opinion of Manwood, Chief Baron, touching corporations." After referring to a number of cases in which this has been upheld, authorities are cited showing that this doctrine has been discountenanced in the United States and also in Canada, as evidenced in the latter country by *Tench* v. *G. W. Ry. Co.*, 32 U. C. R., 452, which was an action of libel. The complete revolution of opinion in the Unite Kingdom is then traced, and the writer concludes by showing that there is no distinction between bodies with souls and bodies without souls in this respect.

Railway Bye-Laws Respecting Passengers' Tickets.—II — This subject is concluded.

Ibid.—22nd January, 1881.

This number contains a valuable article on the High Court of Justice by Mr. Justice Stephen, taken from the *Nineteenth Century*. The article is an able review of some of the principles of the new system, and contains many valuable suggestions. A perusal of this, and some of the other English literature upon the subject of the Judicature Act, will give the profession in Ontario a very good idea of the era of doubt and uncercertainty which they are about to enter upon.

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DIGEST OF SELECTED CASES

ON

CRIMINAL LAW.

ABORTION.

Offence at Common Law.—At common law it was not a punishable offence to produce, with the consent of the woman, an abortion, prior to the time when she became quick with child. *Kentucky Ct. of App.*—*Mitchell* v. *Commonwealth*, 9 Rep. 211.

Evidence.—Where on a trial for procuring an abortion, it appeared that cuts, wounds and bruises were found in the womb of the woman operated upon, indicating the forcible use of some instrument, and that defendant had an opportunity to commit the crime; *Held* by the Supreme Court of Mass., that evidence that four months before the time of the alleged operation defendant had an instrument in his possession which he then described as well fitted to procure an abortion was admissible. *Commonwealth* v. *Blair*, 126 Mass. 40.

ACCESSORIES & ACCOMPLICES.

Concealment.—The concealment of the knowledge that a felony is to be committed will not make the party concealing it an accessory before the fact. *Tex. Ct. of App.*,—*Noftsinger* v. *State*, 3 Tex. L. J. 246.

ARSON.

Evidence of other Crimes.—On a trial for arson, proof that defendant had been guilty of forgery and larceny is not admissible, unless accompanied by evidence that the latter crimes and the one charged had a common purpose, or that one was committed to conceal the others. *State* v. *Miller*, 47 Wis. 530.

Evidence of Ownership of burned Building.—On the trial of an indictment for arson the legal title to the premises is not in issue, and therefore the production of the deed for them is not required as the best evidence of the ownership of them, it being sufficient to prove that the dwelling house burnt was occupied at the time by the person whose dwelling house it is alleged to have been in the indictment. *State* v. *Burrows*, 1 Del. Cr. 74.

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ASSAULT.

Conditional Threat.—To constitute a criminal assault, a battery must be either committed, attempted, intended or threatened unconditionally. Therefore, where in an altercation the accused pointed a pistol at complainant and said "If you come near me I will shoot you," *Held*, that a conviction for assault could not be sustained. *N. Y. Sup. Ct., People* v. *Johnston*, 9 N. Y. Weekly Dig. 384.

AUTERFOIS ACQUIT OR CONVICT.

Where a person is charged with the larceny of a horse, saddle and bridle taken at the same time and place and from the same person, the whole transaction constitutes but *one crime* and but *one* indictment can be sustained for such taking; and if the prosecution see proper to split up the transaction into two offences, by causing two indictments against such person for that which is but one crime, a conviction or acquittal on one may be pleaded as a bar to a subsequent prosecution on the other. *State* v. *McCormack*, 8 Oregon 236.

Where a man has done a criminal act, the prosecutor may carve as large an offence out of the transaction as he can, yet he must cut only once.—*Ib.*

BIGAMY.

Reasonable Belief of Death.—A *bona fide* belief by a wife that her husband is dead is no defence to an indictment for bigamy, unless he has been continuously absent for seven years. *Reg.* v. *Gibbons*, 12 Cox C. C. 237.

Evidence tendered by the defence to shew such *bona fide* belief is inadmissible, and can only be used in mitigation of punishment after conviction. *Reg.* v. *Bennett*, 14 Cox C. C. 45. [*Contra.* See *Reg.* v. *Horton*, 11 Cox C. C. 670, and *Reg.* v. *Moore*, 13 Cox C. C. 544.]

Divorce.—The English Divorce Court will recognize as valid the decree of a Scotch Court dissolving the marriage of domiciled Scotch persons, though the marriage was solemnized in England and the woman was English prior to her marriage.

Semble, in some cases the English Divorce Court might recognize as valid the decrees of a foreign Court dissolving the marriages of English persons. *Harvey* v. *Farine*, 5 P. D. 153.

BURGLARY.

Breaking and Entry.—Where an instrument is employed to *break*, and is without capacity to aid otherwise than by opening a way of entry, and another instrument must be used, or the instrument used in breaking must be used in some other way or manner to commit or consummate the criminal intent, the intrusion of the instrument is not of itself an entry. Ala. Sup. Ct., *Walker* v. *State*, 1 South. L. J. & R. 208.

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Where the instrument is employed not only to *break*, but to effect, the only entry contemplated or necessary to the consummation of the criminal intent, and the person introducing it is thereby enabled to consummate his intent, its introduction is both a breaking and an entry, and the offence is complete. *Ib.*

CHALLENGE FOR CAUSE.

Opinion of Juror.—Where a juror has declared an opinion beforehand that the accused is guilty, it is a ground of challenge at common law. *State v. Allan*, 46 Con. 531.

A mere impression that an accused person is guilty from hearing or reading reports of transactions, would not ordinarily disqualify a person from sitting as a juror, because his mind would not generally be so affected thereby as to disturb his impartiality as a juror. Such an impression hardly deserves the name of an opinion.—*Ib.*

On his examination as to competency, a juror answered that from the evidence given on a former trial of the prisoner, as reported in a newspaper and read by him, he had framed and expressed an opinion on the merits of the case, to change which would require some evidence, but which would readily yield thereto. *Held*, that the juror was competent. *Gustig v. State*, 66 Ind. 94.

Conscientious scruples in regard to the infliction of death as a punishment for crime, constitute cause for the challenge of a juror in a capital case, even though the juror limit his scruples to cases in which circumstantial evidence is relied on for a conviction. *Shafer v. State*, 7 Tex. App. 239.

CHARACTER.

Impeachment of Witness.—Only the general moral character, not specific acts of a witness, may be proved for the purpose of impeachment. *Ind. Sup. Ct.—Cunningham v. State*, 65 *Ind.* 377.

For the purpose of impeaching the veracity of a witness, it is not competent to base belief on personal knowledge, as distinguished from general reputation. *People v. Methvin*, 53 Cal. 68.

CIRCUMSTANTIAL EVIDENCE.

What will Justify Conviction.—To justify a conviction on circumstantial evidence alone, the facts relied on must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt, and the failure of the Court to charge the jury as to this rule of law, when a conviction is sought on circumstantial evidence alone is error. *Tex. Ct. of App.*, *Hunt v. State*, 1 Crim. L. Mag. 234.

CONCEALED WEAPONS.

A person who carries concealed about his person all the pieces of a pistol, which could readily be put together, so as to make an effective

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weapon, is guilty of carrying concealed weapons, though at the time he carried them concealed, the pieces were separated and incapable of use as a fire-arm until put together. *Hutchinson v. State*, 62 Ala. 3.

CONSPIRACY.

When Indictable.—A conspiracy to slander a person by charging him with a criminal offence is indictable. *N. Y. Sup. Ct.—State v. Hickling*, 9 Cent. L. J. 406.

A mock auction, with sham bidders, who pretend to be real bidders, for the purpose of selling goods at prices grossly above their worth, is an offence at Common Law; and persons aiding and abetting such a proceeding may be indicted for a conspiracy with intent to defraud. *Reg. v. Lewis*, 11 Cox C. C. 484.

Declarations of one Conspirator in furtherance of the common design, made after its inception and before its completion, are evidence against his confederates, though made in their absence; otherwise of declarations made after the completion of the unlawful purpose. *Phillips v. State*, 6 Tex. App. 364.

CONTRIBUTORY NEGLIGENCE.

Contributory negligence is not an answer to a criminal charge as to a civil action. *Reg. v. Kerr*, 12 Cox C. C. 355.

[See also *Reg. v. Jones*, 22 L. T. N. S. 217.]

DYING DECLARATIONS.

When Admissible.—It is for the Court to determine whether the facts proved *prima facie* warrant the admission of a dying declaration. All such facts, with the declaration in evidence, must be finally left to the jury in considering the whole evidence in the case. *Commonwealth of Penn.* v. *Sullivan*, 36 Leg. Int. 434.

A considerable length of time between the making of a statement and the time of death (in this case nearly three weeks), does not render the statement inadmissible. *Reg.* v. *Bernadotte*, 11 Cox C. C. 316.

EMBEZZLEMENT.

By Officer "de facto."—An indictment will lie for the embezzlement of public moneys against one who is an officer *de facto* only. *Maine Sup. Ct.—State* v. *Goss*, 8 Rep. 558; *Fortenberry* v. *State*, 56 Miss. 286.

Evidence.—In the trial of an alleged bailee for embezzlement of his bailor's property, it is competent for the prosecution to prove the terms of the contract of bailment by virtue of which the property went into the defendant's possession. It is sufficient to prove a qualified ownership in the alleged owner of the property appropriated by the defendant, and that such owner had the right to the possession and control of it. *Leonard* v. *State*, 7 Tex. App. 417.

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EVIDENCE.

Declarations of Third Persons.—Though, on the principle of acquiescence, declarations made by third persons in the presence of the accused, respecting the matter in question, are ordinarily evidence against him, yet this principle does not apply to declarations which called for no response or disclaimer by him. *Loggins* v. *State*, 8 Tex. App. 434.

Burden of Proof.—When the accused is proved to have done the act charged in the indictment, the burden is upon him to satisfy the jury, that he did it honestly and without any criminal intent. *N. Y. Sup. Ct. Cowley* v. *People*, 21 Hun. 415.

FALSE PRETENCES.

What amounts to.—The purchaser of chattels gave to the seller his cheque on a bank in another State, dated on the day of the sale, and payable twenty-one days thereafter. He said he was rather short, and was frightened that he would not have money enough to pay the cheque. It transpired that he had no money at the bank on which the cheque was drawn, and kept no account there. The conviction for obtaining goods by false pretences was sustained. *N. Y. Sup Ct.—Foote* v. *People*, 17 Hun. 218.

FORGERY.

Secondary Evidence.—If the forged instrument is not produced at the trial, the best proof that can be given of its loss or destruction must be adduced before a copy may be used as secondary evidence. *Reg.* v. *Hall*, 12 Cox C. C. 159.

Indictment.—The term "receipt," used in an indictment for forgery imports a written instrument. *State* v. *Bibb*, 68 Mo. 286.

GRAND JURY.

Objections to the manner of organizing a grand jury cannot be made after a plea and trial. *La. Sup. Ct.—State* v. *Watson*, 31 *La. Ann.* 379.

INTENT.

When an act in general terms, is made indictable, a criminal intent need not be shown, unless from the language or effect of the law, a purpose to require the existence of such intent can be discovered. The question pertains to the department of statutory construction, and to introduce into the act the requisite of a guilty mind, it must appear that such was the intent of the law-maker. *H. N. Y. Ct. of Errors & App*, 12 Vr. 552.

INTOXICATION.

A person accused of crime has the right to show that at the time of its commission he was physically incapable of committing it, by reason of his intoxication or by being prostrated by disease. 5 Wis. L. N. 208.

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JURIES.

The use of intoxicating liquors by members of the jury, pending the trial and before the final submission of the case, it not appearing that the defendant had been prejudiced thereby, was *Held* not to vitiate the verdict. *State* v. *Bruce*, 48 Iowa 530. *Tuttle* v. *State*, 3 Tex. L. J. 41.

LARCENY.

The finder of lost goods, which have no marks upon them by which the owner could be identified, and who does not know to whom they belong, is not guilty of larceny, even if he does not exercise diligence to discover who the owner of the goods may be. *Iowa Sup. Ct.*—*State* v. *Dean*, 1 Crim. L. Mag. 209.

LIBEL.

A corporation may be indicted for libel. *Tenn. Sup. Ct.*—*State* v. *Atchison*, 3 Lea. 729.

MALICIOUS INJURY.

Poisoned Flesh.—The placing of poisoned flesh in an inclosed garden, for the purpose of destroying a dog which was in the habit of straying there, is not an offence punishable under the Imperial Act 24 & 25 Vict., cap. 97. s. 41. [32-33 Vict., cap. 22, s. 47, Canada.] *Daniel* v. *Janes*, 2 C. P. D. 351.

MANSLAUGHTER.

Engaged in Friendly Game.—If, while engaged in a friendly game, one of the players commits an unlawful act whereby death is caused to another, he is guilty of manslaughter. *Reg.* v. *Bradshaw*, 14 Cox C. C. 83.

In such a case it is immaterial to consider whether the act which caused the death was in accordance with the rules and practice of the game. The act would be unlawful if the person committing it intended to produce serious injury to another; or if, committing an act which he knows may produce serious injury, he is indifferent and reckless as to the consequences. *Ib.*

Through Neglect of Duty.—To render a person liable to conviction for manslaughter through neglect of duty, there must be such a degree of culpability in his conduct as to amount to gross negligence. *Reg.* v. *Finney*, 12 Cox C. C. 625.

Of Children or Helpless Beings. — A grown-up person, who chooses to undertake the charge of a human creature, helpless either from infancy, simplicity, lunacy, or other infirmity, is bound to execute that charge without wicked negligence; and if such person by wicked negligence lets the helpless creature die, that person is guilty of manslaughter. *Reg.* v. *Nicholls*, 13 Cox C. C. 75.

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NUISANCE.

A house, in which unlawful sales of liquor are *habitually* made, is an indictable nuisance, although there is a city ordinance prescribing the penalties for such sales, as such traffic is not only a breach of the city law, but also of the statutory policy of the State. *Meyer* v. *State*, 12 Vroom 6. (N. J.).

RAPE.

The testimony of medical experts in a trial for rape, as to the effect of indecent liberties upon the mind of the female, is inadmissible. Such acts are to be classed under the head of solicitation, and distinguish the crime of seduction from that of rape. *People* v. *Rosal*, 53 Cal. 62.

RECEIVING STOLEN GOODS.

Where, on the trial of an indictment for receiving stolen goods, there is proof of the possession of the goods by defendant, but no proof of the stealing of them by any other person, such possession alone is not sufficient to support the indictment, as it raises a presumption of larceny, not of receiving. *Reg.* v. *Perry*, 3 Legal News, 12 (Quebec).

SELLING LIQUOR ON ELECTION DAY.

The "entire day" in an act regulating elections, by which it was made penal to sell, barter or give away any liquor, comprises the twenty-four hours of the day of the election, from midnight to midnight thereof, and not merely the portion of the day during which the polls were open. *Lawrence* v. *State*, 7 Tex. App. 192.

TRIAL.

Prosecutor Conducting Case.—In a criminal prosecution it is not competent to the prosecutor to appear and conduct the case in person. *Reg.* v. *Gurney*, 11 Cox C. C. 414.

View.—It is no irregularity to allow a jury in a criminal case to have a view of the premises after the Judge has summed up. *Reg.* v. *Martin*, L. R. 1 C. C. 378.

Proof of Civil Proceedings.—On the trial of an indictment for perjury upon the hearing of a civil action, the production of a copy of the writ and pleadings from the record and writ clerk's office was held evidence that an action was pending. *Reg.* v. *Scott*, 2 Q. B. D. 415.

WITNESSES.

Children *or other persons*, who having been examined by the Court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath, are incompetent as witnesses. *Ake* v. *State*, 6 Tex. App. 398.

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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

In the Queen's Bench.

[HILARY TERM, 1881.

THE QUEEN v. HOODLESS.

Recognizance—Irregularity.

In a recognizance taken before a police magistrate, pursuant to 32-33 Vic., cap. 30, sec. 44, following the form given in Schedule (Q. 2) to the Act, the words "to owe" were omitted in the printed form which was used.

Held, that the omission was fatal, and an action brought upon the same as a recognizance could not be maintained.

Osler, Q.C., for the Crown.
Richards, Q.C., for defendant.

SMITH v. FAUGHT, *et al.*

Ejectment—Will—Restraint upon Alienation.

Held, that the direction in a devise in fee simple to A. F. F. by her father that she should "not sell or cause to be sold the above-named lot or any part thereof during her natural life, but she shall be at liberty to grant it to any of her children whom she shall think proper," was a valid restraint upon alienation.

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In ejectment upon a mortgage in default, made by the devisee of the above lands to the plaintiff, against the mortgagor and her son, to whom, after making the mortgage to the plaintiff, she had conveyed the lands by statutory deed, pursuant to the power in the will,

Held, that the giving of the mortgage, which was done in good faith, was not a violation of the restraint upon alienation expressed in the will, and the plaintiff was entitled to recover.

Delamere, for plaintiff.
Kerr, for defendant.

GRIFFIN v. PATTERSON.

Husband and Wife—Separate Estate—Tenants by Entireties.

Action for the price of household goods supplied in 1877 by plaintiff to the female defendant, who was married in 1856 without a marriage settlement, and who resided with her husband and family. The husband and wife were seised by entireties under a devise of land made in 1866. In 1874 the Sheriff affected to sell the husband's interest under an execution to the wife.

Held, that the wife's interest in the real estate was not of such a quality as to entitle the plaintiff to a remedy against it.

Held, also (Armour, J., *dissenting*), that she was not liable to the plaintiff for the goods supplied.

Per Hagarty, C.J. The fact that a married woman, living with her husband and family, orders household goods, raises no implied promise to pay or to bind her separate estate, or any presumption save that she acts as her husband's agent.

The interest of the husband, being inalienable, was not saleable under execution, pursuant to R. S. O., cap. 66, sec. 39.

Per Armour, J. Whatever might be the effect of the Sheriff's sale, it should be treated according to the effect ascribed to it by the plaintiff and female defendant by their conduct, viz., as having vested the estate in her.

There should be a new trial to ascertain whether the plaintiff's claim was the debt of the wife incurred by her in respect of any employment or business in which she was engaged on her own behalf, or whether it arose by virtue of her own contract, or was her separate debt. But from the evidence as it stood, it appeared a fair inference that the claim was the separate debt of the wife, part of it being incurred by her in respect of the business of farming in which she appeared to be engaged on her own behalf; that she had contracted in respect of separate personal estate

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appearing to be hers, and that the name of the husband should be struck out, and a verdict entered for the amount against the wife.

Quære, as to the effect of the married woman's act upon an estate by entireties.

N. D. Beck, for plaintiff.

Edmison, for defendants.

COOPER v. HAMILTON.

Ejectment—Statutes of Limitation.

John C., being owner in fee of the land in question, some time after 1854 placed his brother James C. in possession to occupy the same rent free. In 1867 defendant, having married a daughter of James C., went to live with the latter and occupied a part of the house in obedience to John C., who wished that his niece might remain in the house to take care of her infirm mother, who, however, objected to this arrangement. John C. died on the 2nd September, 1874, and devised the land to the plaintiff. James C. died in 1873 or 1874, and his wife about a year afterwards. In 1875 one G., with the plaintiff's husband, entered and went through the house with the view of renting it, when the defendant said if it was going to be rented he would rent it himself, and pay as much as any one, or would buy it. The action was commenced on the 30th March, 1879.

Held, that the plaintiff was entitled to recover as against the defendant, who set up the Statutes of Limitations.

Per Hagarty, C. J. The defendant was never tenant to John C. during the life time of James C. and his widow, and the Statute would not begin to run in his favour till a year from the death of the latter.

Per Armour, J. The entry of defendant in 1867 under John C.'s authority determined the tenancy at will of James C. theretofore existing, and a new tenancy at will thereupon commenced. Upon the death of James C.'s widow the defendant became tenant at sufferance to the plaintiff, and an entry by her husband with G., acquiesced in by the defendant, was a sufficient entry to create a new tenancy at will and to stop the running of the Statute.

Ferguson, Q.C., for plaintiff.

Robinson, Q.C., for defendant.

BARR v. DOAN.

Deceit—Fraudulent Representation as to Mortgage—Duty of Purchaser of.

The defendant was mortgagee of the plaintiff's farm, and the latter being unable to pay the mortgage, asked the defendant to buy the farm, and the defendant offered him therefor some cash and a mortgage for $619,

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representing to him that the mortgage was a second mortgage and that any money-lender would readily cash it at a small discount, and so induced plaintiff, an ignorant man, to accept it, when in fact the defendant knew it was a fourth mortgage and was almost worthless. The jury found for the plaintiff. On a motion for a non-suit,

Held, that there was no obligation cast upon the plaintiff, as a matter of law, to examine the title or search the Registry Office, but that his omission to do so was matter for comment only.

Semble, that on sustaining the verdict a re-conveyance of the mortgage to the defendant might be ordered.

Nothing was said as to the amount of the prior mortgage, but the jury having found that the representation was false to the knowledge of the defendant and was made with intent to defraud the plaintiff, and the verdict not being moved against on the weight of the evidence, the Court refused to disturb the finding.

Hagel, for plaintiff.
McCarthy Q.C., for defendant.

CLARK v. CREIGHTON AND GORDON.

Feme Covert—Separate Estate.

Action on a promissory note made by the defendant G., a feme covert, married after 2nd March, 1872, without a settlement, and C., her brother, as trustees under their father's will, for the purpose of raising money to pay some insurances on the trust estate.

The testator devised his real estate to his trustees, on trust, to sell such portions as B. should deem expedient, and out of proceeds to pay debts and invest residue, and to expend income in maintenance of the trustees, and his other children, until the youngest child should attain 21; and on the youngest attaining that age, an equal division to be made amongst all the children, issue of deceased children to represent their parent.

Held, that, until the coming of age of the youngest child, C. had no separate estate available in execution, and that she was not liable on the note.

Armour, J., dissented, holding that the true construction of the Married Woman's Property Act is impliedly to enable a feme covert to incur debts, to make engagements, and to enter into contracts as if she were a feme sole, and that the remedy in respect of any such debts, engagements, contracts, or torts should be against her personally, and should not depend upon whether she ever had any separate estate or not.

J. K. Kerr, Q.C., for plaintiff.
W. Nicholas Miller, for defendants.

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NEILL, ADMINISTRATRIX v. THE UNION MUTUAL LIFE INSURANCE COMPANY.

Life Policy—Overdue premium—Payment.

J. N. was insured with the defendants by a policy dated 8th May, 1877, on which quarterly payments were due on the 10th days of February, May, August, and November, in each year. The policy among others contained the following conditions:—"If any premium, etc., shall not be paid when due the consideration of this contract shall be deemed to have failed, and the company shall be released from liability, and the only evidence of payment shall be the receipt of the company, signed by the President or Secretary." "If for any reason the premium is received after it becomes due it is upon the express condition that the party is in good health, and of correct, sober, and temperate habits, otherwise the policy shall not be put in force, etc." "In case any note, cheque, or draft, given towards the payment of any premium, shall not be paid at maturity, this policy lapses in the same manner as upon the non-payment of the premium."

McN., the general agent of the company at Toronto, was in the habit of receiving payment of premiums after they were due, of which the company were aware, and did not disapprove. On 24th September, 1879, a cheque was given by the assured's firm to McN., with the understanding that it was to be held till there were funds, as he had often done formerly. It was several times presented and dishonoured. On 8th October, McN.'s successor in office notified the assured that if the cheque were not paid at once the receipt would be returned to the company. On 21st October, in answer to S. the agent's messenger, assured's partner said that there were funds for the cheque at the bank; but as it was nearly three o'clock, S. said he would wait till the morning. That evening the assured was killed, and the cheque was therefore not presented, but was retained by the company. The plaintiff produced all the premium receipts, except that of 10th August, 1879.

The jury found that the defendant's agent had waived the payment of the premium due 10th August by receiving the cheque, and a verdict was entered for the plaintiff.

Held, (Cameron, J., *dissenting*), that though the defendants appeared willing up to the 21st October to receive payment and keep up the policy, yet there was no waiver of the terms of payment, and no existing agreement or anything binding them to extend the time for payment and to remain liable, and that the cheque was not taken in payment.

Per Cameron, J. The application by the defendant's agent on the 21st October for payment of the premium and the retention of the cheque, was equivalent to accepting a new cheque, which (there being funds therefor) would be payment.

Ferguson, Q. C., (with him, *G. H. Watson*), for plaintiff
Robinson, Q. C., for the defendants.

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MOFFATT v. THE RELIANCE MUTUAL LIFE ASSURANCE SOCIETY.

Life Policy—Authority of General Agent—Overdue Premium—Promissory Note.

J. M. was insured by a policy under which thirty days grace were allowed for payment of premiums. A lapsed policy might be renewed within a year upon proof of health, payment of arrears and a fine. S. was the resident secretary in Canada of the defendants, with the powers of a general manager. There was a local board of directors in Canada, but S. communicated directly with the board in England, took his instructions from them, and laid before them monthly accounts, from which it could be ascertained whether premiums falling due the preceding month were unpaid. The assured, being unable to pay a premium about to fall due, wrote to S., asking him to take a note at three months. S. replied: "I am sorry you require three months' time, but I suppose it must be done, although it is against our rules. I shall have to take the responsibility myself. I enclose you draft for acceptance, which please return early." He also wrote that the company were very particular about overdue premiums. From this time S. accommodated the assured by taking notes, to which interest was added. On the 9th August, 1879, E., the cashier of defendants, wrote to the assured, acknowledging the receipt of his letter with a blank note which had been sent to S., to be filled up for the renewal of a note about to fall due, and saying that S. was absent from town, and that, as the two premiums of November, 1878, and May, 1879, were so long overdue, he should have to refer the matter to S., on his return; adding, "until the back premiums are paid, the Society is off the risk."

The death occurred on the 24th October, 1879, at which time there were two notes outstanding—one for the premium due 30th November, 1878, dated 7th February, 1879, at six months, which was unpaid; and one dated 21st June, 1879, at six months, for the premium which fell due on the 30th May, 1879, which was still current. After the death, the amount of these two notes was tendered to the defendants and refused.

The jury found that the notes were taken by defendants' agent as cash payments, that the taking of them was within his authority, that he had waived payment upon the dates the premiums were due; and a verdict was entered for the plaintiffs.

Held (Hagarty, C.J., *dissenting*), that the evidence showed that it was within the authority of the resident secretary to accept notes in payment of premiums, and there was nothing in evidence which would give notice to the assured of any want of such authority, and the verdict ought not to be disturbed.

Per Armour, J. The defendants had become aware of the acceptance of notes and had ratified it.

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In Chancery.

[The Chancellor, 15th February, 1881.

LARIO v. WALKER.

Conveyance in fee—Repugnant limitation—Pleading—Demurrer.

A conveyance in fee in which the operative words were, "grant, bargain, sell, release and confirm," contained a *habendum* "unto the said L., his heirs and assigns to the sole and proper use, benefit and behoof of the said L., his heirs and assigns forever." Following the statutary covenants for good title, quiet enjoyment and further assurance was this proviso:—"Provided always, and nevertheless, that the above L. shall have no right to sell, alien, or dispose in any way whatsoever of the above mentioned premises; but have only the use during his lifetime, after which his children will have full right to the said property above mentioned."

Held, that the proviso, whether regarded as a condition, or as a limitation, was repugnant and void, and that L. took a fee simple.

The Bill alleged that the plaintiff was the grandson of L., who had died intestate.

Held, on demurrer *ore tenus*, that the plaintiff had not sufficiently pleaded his title.

Caswell, for demurrer.
Boyd, *Q. C.*, contra.

GREENSHIELDS v. BRADFORD AND JENKINS.

Statute of limitations—Caretaker—Purchaser for value without notice—Pleading.

The defendant B. squatted upon and enclosed a small piece of the land in question in or about 1865. In 1872, the plaintiff's agent found B. on the land, and the latter admitted his want of title, and said he would leave when the land was sold. The plaintiff's agent then said he would allow him to stay if he would look after the place and keep off trespassers, which he agreed to. The plaintiff also had seen B. on the land about 1871 or 1872, and, as B. alleged, told him that he and his wife might stay there during their lives. In 1878, plaintiff's agent again saw B., and the latter signed this paper:—"Mr. D. J. Greenshields,—Sir,—Hearing that you are about to sell lot * * part of which is occupied by me, I would beg to remind you that you agreed to allow me to remain upon it during my life. I now write to you that I would like to be allowed to remain during my life time, and during the life time of my wife. I will still act as your agent in taking care of the place and keeping off trespassers. (Signed) R. E. Bradford." The plaintiff always paid the taxes.

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Held, on the evidence that the defendant B. was in as caretaker of the plaintiff by the arrangement in 1872, and so remained, and that the Statute would not run in his favour.

Held, also that the paper above set forth was a sufficient recognition of the plaintiff's title, and that the defendant could not put the plaintiff to proof thereof.

After signing the paper above set out, B. and his wife affected to convey in fee to the defendant, J., their grandson, in consideration of $1, and the support and maintenance of the grantors. The answer did not set up that B. was seised, or pretended to be, nor that J. believed that he was seised, nor that B. was in possession, nor that the consideration had been paid; but denied notice of alleged agency.

Held, that he had not brought himself within the protection accorded to an innocent purchaser, and at any rate the transaction was a suspicious one; and that, there having been before this deed a recognition by B. of the plaintiff's title, it was a recognition of a legal title in the plaintiff, against which a plea of purchase for value would be of no avail by J. claiming under B.

ADAMSON v. ADAMSON.

Statute of Limitations—Equitable remainder—Res judicata—Admissibility of depositions taken in former suit.

J. A., being tenant in fee simple, by lease and re-lease on the 8th and 9th August 1837, conveyed lands to P. A. and C. in trust for the use of E. A. his wife for life, remainder in fee-simple to his two sons G. A. and the plaintiff as joint tenants. E. A. went into possession by her tenant. In 1863 E. A. demised the land to C. A. the husband of defendant. C. A. died in December 1863, having been barely six months in possession and his widow the defendant remained in possession. G. A. died in 1855 leaving plaintiff solely entitled in remainder. C. died leaving his co-trustee surviving, who on his decease in 1865 devised the land to M. and wife, who conveyed the legal estate to the plaintiff in January, 1878. E. A. tenant for life died in February 1875.

Held, that the position taken by the defendant that her husband's possession and her own were adverse to the tenant for life was displaced by the evidence; that the plaintiff could not have put the trustees in motion until he had become entitled as remainderman on the death of the tenant for life, and no laches previous to that time was imputable to him; and that there was nothing to bar the right of the remainder man to recover in this suit.

A bill had been formerly filed upon his equitable title by the plaintiff. He acquired the legal estate *pendente lite*, but the bill was dismissed as premature so far as it sought possession, without prejudice to any other proceeding the plaintiff may take on his present title.

Held, that the real questions in issue not having been adjudicated upon, but the bill having been dismissed merely because it was premature the defendants could not set up *res judicata* as to the equitable title in this

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suit so as to confine the plaintiff to his title acquired pending the former suit.

In this suit the plaintiff offered in evidence the examination of the defendant by the plaintiff in the former suit, and the evidence taken *viva voce* at the hearing thereof.

Held, that they were admissible in this suit as the question was the same as in the former suits—the real question being whether the Plaintiff was *cestui que trust* under his father's settlement, and whether his remedy was barred by the Statute of Limitations; the only exception being that one remedy was sought in the former suit which was not sought in this.

The Attorney General (with him, *Maclennan Q. C.*), for plaintiff.
Blake, Q.C. (with him, *Bethune, Q.C.*), for defendant.

RIPLEY v. RIPLEY.

Dower—Election—Waiver.

A will contained the following clauses:—"I will and bequeath unto my beloved wife, Mary Ripley, an annuity of $60 lawful money of Canada during her lifetime, payable by my said son John Ripley, his heirs and assigns * * * * * together with all and singular my household furniture, etc. And should my said wife see fit to remain in the dwelling house on the premises after my decease, I order that she shall have the free use of the sitting room and the south-east corner bedroom, and in case of sickness, while she remains in said apartments, that my said son John shall see that she has proper medical attendance and nursing, and that he shall furnish her with firewood for one stove." The testator charged this annuity and the "bequests, conditions and obligations" mentioned in the will, upon the land in question, and devised the same so burthened to his son, John Ripley, the defendant by bill.

The widow filed her bill for payment of the annuity alone, claiming neither a lien on the land in respect of the other charges created in her favor by the will, nor dower. The usual decree for payment, or in default sale, was made, reference to the Master at Hamilton. The land was sold under the decree, free from dower and other charges, and the purchase money paid into Court. In the Master's Office, the widow made no claim either for dower or otherwise.

The widow now presented a petition to have it declared that she was entitled to dower in the said land, and to compensation in respect of the easements above set out, and prayed that a sum in gross out of the money in Court should be paid to her in lieu of dower, and a proper sum allowed by way of compensation.

Held, following *Murphy* v. *Murphy*, 25 Gr. 81, that the widow was not put to her election by the will, and that she was entitled to have a proper sum paid to her for dower out of the purchase money in Court.

Held, also, that she had, by acquiescing in the sale of the land, and by her laches, waived her right to any compensation for the loss of the easements.

Black, for petitioner.
R. Martin, Q.C., and *G. H. Watson*, for subsequent encumbrancers.

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[BLAKE, V. C.

SOMMERVILLE v. RAE.

Preferential Conveyance.

Where a defendant had obtained from his co-defendant, his debtor, a deed of land to secure his debt, which was attacked by the plaintiff who had obtained an execution after the conveyance, on the ground of fraudulent preference, it appeared on the evidence that the grantee only claimed his debt.

Held, that though the conveyance was *bona fide*, and was not made to defraud creditors, an account should be taken of the amount due to the grantee, the land sold and the proceeds applied, first in payment of the grantee's debt and costs, and the balance as in ordinary fraudulent conveyance cases. The usual reference as on a fraudulent conveyance was therefore directed.

NELLES, ASSIGNEE v. THE BANK OF MONTREAL.

Insolvent Act of 1875, sec. 134—Payment in contemplation of Insolvency.

Held, upon the evidence in this case, that certain transactions which took place between the defendants and K., the insolvent, shortly before the latter absconded, were not in contemplation of insolvency, but were attempts made in good faith to enable K. to carry on his business; and that the defendants' Manager was not aware of the insolvent condition of K.

Boyd, Q.C., for plaintiff.

Moss, for defendants.

[REHEARING TERM, 17TH FEBRUARY, 1881.

CAMERON v. WELLINGTON, GREY & BRUCE RAILWAY CO.

Farm crossings—Parol Agreement—"Make and Maintain," Construction of

The original plaintiff, D. C., conveyed a right of way over his land to the defendants in 1869, and the deed contained the following stipulation:—"The Company to make and maintain a farm crossing with gates at the present farm lane." R., the Company's Engineer, treated for the conveyance, and had no power to agree for a second crossing. But it was said he had promised, if he should find a second crossing necessary, he would, so far as in him lay, get it done, and the deed was executed upon this understanding.

Held, reversing the decree of Proudfoot, V.C., 23 Gr. 95, that the defendants could not be compelled to make a second crossing for use in winter, the existing one being then impassable, and that upon the construction of the words above set forth, they were bound to continue the crossing, not to close it up or impair it, or alter its character as a farm crossing, but were not obliged to keep it free from snow.

Proudfoot, V.C., retained his opinion.

Boyd, Q.C. for plaintiff.

Bethune, Q.C., for defendants.

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In re LAWS, LAWS v. LAWS.

Husband and Wife—Wife's Chose in Action—Reduction into Possession—Evidence—Statute of Limitations.

The widow of the intestate claimed of his estate a sum of $700, which she alleged he had borrowed from her after their marriage, and some years before his death, for the purpose of buying a stock in trade. The money was deposited in a bank at the time of the marriage, which took place before the C. S. U. C., cap. 73. The only evidence offered in corroboration of the claimant's was that of one B., who said:—"He (Laws) told me he had got $600 or $700 from his wife. She had a little money. He said he had paid that money for the things he had in the store. This was after he had bought L. out. * * He said his wife had helped him to $600 or $700 * * I understood he had used the money to buy out the business."

Held, affirming the order of the Chancellor, reversing the finding of the Master, that she could not recover.

Per Blake, V.C. The evidence of the widow was not sufficiently corroborated.

Per Proudfoot, V.C. The evidence that the chose in action was originally hers, and that she gave it to her husband, was corroborated, and that this corroboration was sufficient to support her own evidence that it was a loan. But that as the transaction took place before the C. S. U. C., cap. 73, under which she had the right to assert her proprietorship as against her husband, and as incident thereto, the right to bring a suit against him; and as to any such proceedings, the Statute of Limitations would be a bar; therefore, her remedy was gone.

F. Beverley Robertson, for the widow.
Laidlaw, for defendant.

KASTNER v. BEADLE.

Right of Way—Obstruction of.

An arrangement made between the plaintiff and B., whereby the latter "was allowed to go through" the plaintiff's land, was superseded by an agreement whereby, in consideration of 150 cords of wood and the making of the road by B., the latter was to have a right of way through the plaintiff's land. The plaintiff was to erect and keep up the gate at one end, and B. to keep up the gate at the other end, of the road. The wood was delivered, and the road made, according to the terms of the agreement. The plaintiff subsequently erected three gates along the course of the right of way, which were not necessary for the enjoyment of the land. The bill was filed to restrain the defendant from using the way except upon the terms of shutting these three gates when going through.

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Held, reversing the decree of the Chancellor, that the right of way having been purchased when there were but two gates, the plaintiff had no right to fetter the enjoyment of the way by adding other gates.

See *Heward* v. *Jackson*, 21 Gr. 263 and cases cited therein.

Boyd Q.C., for plaintiff.
Idington, *Q.C* , for defendant.

EXCHANGE BANK v. SPRINGER.
THE SAME v. BARNES.

Parties—Principal and Surety—Non-joinder of Principal.

One M., and the defendants, as his sureties, executed a bond conditioned for the good behaviour of M., a clerk of the plaintiffs at Montreal. The bond was executed at Hamilton by the defendants. who were resident there. M. made default at Montreal, and absconded. These bills were filed against his sureties, without joining M. for the breach of the condition of the bond.

Held, affirming the order of Proudfoot, V.C., that the plaintiffs could not proceed against the sureties alone, if they required the joinder of the principal in order that they might have their remedy over against him.

Per Spragge, C. Though the breach occurred in Montreal, and there was no cause of action till default, yet there was a potential equity in the defendants, co-eval with the execution of the bond, which became a right of suit on the default of M.; and there was also an implied contract on the part of M., upon execution of the bond, to repay to his sureties any moneys that they might have to pay by reason of his default.

Per Blake, V.C. The plaintiffs having filed their bill in Ontario, must be taken to admit that the Court has jurisdiction in respect of the matters therein embraced; and the practice of the Court requiring it, and a method having been provided for service of process out of the jurisdiction, the plaintiffs were bound to follow the practice on objection taken.

Bethune, *Q.C.* (with him *E. G. Patterson*), for plaintiffs.
Boyd, *Q.C.* (with him, *McKelcan*, *Q.C.*), for defendant Springer.
R. Martin, *Q.C.*, for defendant Barnes.

Common Law Chambers.

[CAMERON, J., 21st JANUARY, 1881.

PAGE v. PROCTOR.

Security for costs—Right to increase in amount.

The defendant had obtained the usual order for security for costs to be furnished by the plaintiff who resided beyond the jurisdiction. The order provided that "security to the satisfaction of the Master" be furnished. The plaintiff under the direction of the Master, without notice to the defendant paid $200 into Court instead of giving a bond. During the pro-

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gress of the suit the plaintiff issued a commission to take and did take the evidence of a witness about to leave the jurisdiction; and, an examination of the plaintiff being had at Boston, it was apparent that the sum paid into Court would not cover the costs of the defendant. Application for further security was made after notice of trial given and was refused.

Held, on appeal from Mr. Dalton, reversing his decision, that the right of defendant to be secured for his costs is not exhausted by one application except in a case where all the circumstances causing the probable increase of defendant's costs are before the Master, and are considered by him upon settling the amount in the first instance.

See *Foster* v. *Colby*, 27 L. J. Ex. 54; *Republic of Costa Rica* v. *Erlanger* L. R. 3 Chy. Div. 62, and cases there cited.

W. H. P. Clement, for the appeal.

Stoddart (*Cameron, Appelbe & McPhillips*), contra.

[OSLER, J., FEBRUARY 1881.

GHENT v. McCOLL; THE CANADA PERMANENT LOAN AND SAVINGS COMPANY, GARNISHEES.

Ejectment—Judgment for Plaintiff's Cost—Garnishment.

The plaintiff recovered judgment in ejectment for possession and costs of suit. The garnishees were in possession of $172 belonging to the defendant which she had paid to them by mistake; and this sum the plaintiff sought to attach in order to satisfy his costs of suit.

Held, on appeal from Mr. Dalton's order discharging the garnishee summons and rescinding the attaching order, that a plaintiff in ejectment is not a judgment creditor within the meaning of sec. 304 of the C. L. P. Act; and that that section is not substantially different from sec. 287 of C. S. U. C. cap. 22 under which such an order has been refused. See *Herr* v *Douglas*, 4 Pr. R. 124; *Walker* v *Fairbairn*, 6 Pr. R. 251.

Caswell for plaintiff.

Leonard (*Jones Bros. & Mackenzie*), for Garnishees.

[OSLER, J. 19 FEBRUARY 1881.

THE QUEEN *ex rel.* KELLY v. ION.

Municipal Councillor—Property Qualification.

Summons to remove defendant from the office of councillor on the ground of want of proper qualification. The property on which the defendant assumed to qualify was assessed at $1600, and it was subject to a mortgage of $1500. It was attempted to be shown by affidavits that the actual value of the lands was $2,800, and it was contended that the amount of the mortgage should be deducted from the real, and not the assessed, value of the land.

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Held, under R. S. O. cap. 70, sec. 70. that the assessed value of the property only can be looked at in arriving at the amount of property qualification. The summons was therefore made absolute to unseat the defendant with costs, and for a new election.

Reg. ex rel. Fluett v. *Semandie*, 5 Pr. R. 19.
Davidson, for relator.
Tizard, for defendant.

Chancery Chambers.

[THE CHANCELLOR, 15TH FEBRUARY 1881.

LONDON & CANADIAN L. & A. CO. v. EVERETT.

Sale suit—Foreclosure after abortive sale—Infants—Day to show cause.

In a mortage suit the usual decree for sale had been made against Infants, but the sale proving abortive, the plaintiffs applied for foreclosure. The Referee in making the order of foreclosure reserved a day to the Infants to show cause after attaining twenty one. On appeal from this order, on the grounds that the same should be absolute, it was

Held, that though the decree for sale was absolute in form, the object being that a good title might be given to purchasers and that sales should not be hampered, yet the sale not having been carried out, the Infants were not deprived of their right to ask that a day be reserved upon foreclosure being asked.

Arnoldi, for plaintiffs.
Plumb, for infants.

[PROUDFOOT, V.C., 15TH FEBRUARY 1881.

HUGHES v. HUGHES.

Affidavit of Justification—Examination of Deponent.

Held, affirming the order of the Referee, dismissing an application to set aside for irregularity a subpœna and appointment for the cross-examination before a special examiner of the sureties to an appeal bond upon their affidavits of justification, that the deponents were bound to attend and be examined under general order 268.

Donovan, for the appeal.
G. Morphy, contra.

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Master's Office.

[THE MASTER IN ORDINARY, 24TH JANUARY, 1881.

MOORE v. BOYD & MOORE.

Examination of co-defendant—Costs—G. O. 138.

Bill for specific performance of agreement made between plaintiffs' deceased father and defendant, B. Defendant, M., the widow of the deceased, had formerly filed a bill for the same purpose; but the suit had been settled out of Court, she receiving a sum of money. It appeared that the present suit was brought at her instance, she believing that her compromise did not debar the infant plaintiffs from bringing their suit. She, however, refused to be joined as plaintiff, and was made a defendant. B. had examined her during the progress of the suit, and the plaintiffs' Solicitor had attended and cross-examined her. The taxing officer refused to tax to him his cost of the examination.

Held, on appeal from this ruling to the Master in Ordinary that defendant, B., was a party adverse in point of interest to defendant, M., and so entitled to examine her under G. O. 138, and that therefore his costs of the examination should be taxed to him.

Court v. *Holland*, 8 Pr. R. 219 explained.

Moffatt, for the appeal.

Munson (*G. H. Watson*), contra.

First Division Court, Frontenac.

[2ND FEBRUARY, 1881.

CLAXTON v. SLY.

Claim for Rent against Bailiff—Terms of holding.

Action by a landlord against a bailiff, under section 211 of the Division Courts Act, for not paying rent before removing and disposing of the goods of a tenant seized under execution. The notice to the Bailiff followed form 20 as settled by the Judges in framing Rules and Forms. It was objected that it did not "state the terms of holding" as required by section 211 of the Act, the words used being "for one year's rent ending, etc."; that for anything that appeared, the tenancy might have been monthly or weekly. On the other side it was argued that these words did sufficiently state the terms as they might be implied from the notice, and at any rate the notice following the form given was sufficient; citing *Re Wilson*, 23 U. C. R. 301; *Re Allison*, 10 Ex. 561; and section 241, Div. Ct. Act.

Held, by Price, J. C. C. Frontenac, that the notice sufficiently complied with section 211, and even if not, it would be good as following the Form 20.

(Reported by T. H. McGuire, Esq., Barrister-at-Law.)

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NOVA SCOTIA.

In the Supreme Court.

[15TH DECEMBER, 1880.

McNAB v. SHORTLAND.

[Before YOUNG, C. J., DES BARRES, SMITH, JAMES and WEATHERBE, JJ.]

The assignee of a judgment recovered by the plaintiff against the defendant, duly recorded the certificate of judgment and the assignment in the Registry of Deeds. The plaintiff afterwards undertook to deal with the judgment as his own and signed a satisfaction piece which was also recorded. A rule *nisi* was taken at the instance of the assignee to set aside the satisfaction piece, but the Court declined to interfere, considering that the remedy must be sought in the Equity Court.

[4TH JANUARY, 1881.

GRAHAM v. CHISHOLM, *et al.*

[Before YOUNG, C.J., RITCHIE E.J., DES BARRES and JAMES, JJ.]

An action was brought against one of the defendants, the son of the other defendant, for breach of promise of marriage. in which a judgment was recovered and recorded. Previous to the commencement of such action the son had purchased and obtained a deed of certain land which was not recorded, and it was alleged in plaintiff 's writ or bill that fearing an adverse judgment in the breach of promise suit the son had destroyed the old deed and procured a deed of the property to be made to his father, which was ante-dated so as to make it appear to have been delivered before the commencement of the action for breach of promise, although in fact it was made afterwards. On being imprisoned under the judgment in the breach of promise suit, defendant, the son, was set at liberty on condition of his assigning his interest in the property to the plaintiff in this action, as trustee for the plaintiff in the breach of promise suit, which he did. A suit in Equity was then brought, in which plaintiff prayed that defendant (the father) should be decreed to convey the land in question to him and account for the profits. The Equity Judge, considering that the destruction of the old deed and substitution of the new one was a contrivance between the father and the son, granted the relief prayed for and the full court having arrived at the same conclusion on the facts, without calling on plaintiff 's counsel, affirmed the decision of the Judge in Equity.

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[8TH JANUARY, 1881.

INGLES v. GREENWOOD.

[Before DES BARRES, SMITH, JAMES and WEATHERBE, JJ.]

Plaintiff brought an action of replevin for certain goods signed under a warrant of distress for water rates claimed by the City, and the writ alleged an unjust detention, but contained no allegation of an unlawful taking. Defendant denied the detention, and pleaded a second plea, justifying under a distress for water rates, to which plaintiff replied, disputing the liability.

Held, that as there was no complaint in the writ of an unlawful taking, and no proof of a demand of the goods by plaintiff he could not recover in this form of action.

McGIBBON v. IMPERIAL INSURANCE COMPANY.

[Before YOUNG, C. J., DES BARRES, McDONALD and JAMES, JJ.]

Plaintiffs obtained $5,000 insurance on a mill and machinery from defendants' company, in addition to $4,000 insured in another office. In a letter from plaintiffs to their agents in Halifax, they described the mill and machinery as a good risk for $10,000, (for which they were then instructing them to insure it), and estimated that it could not be replaced for $15,000, although they had purchased it from a bankrupt estate for $3,500. Plaintiffs' witnesses valued the property variously from $10,000 to $20,000, and defendants called no witnesses as to the value.

Held, that the verdict for plaintiffs could not be disturbed under this evidence on the ground of a "false and fraudulent representation that the property insured was worth $15,000, when its real value was much less."

One of the conditions of the policy required the application to state by whom the property was occupied, and whether any manufacturing was carried on within or about it, and plaintiffs had described it as a framed building, occupied as a water power saw-mill. It had been built about 1870, and worked for about four months in every year for three years, from which time, until it was purchased by plaintiffs in December, 1877, it appeared to have been unoccupied and unused as a mill. When plaintiffs purchased they immediately went into possession, and put their servants in charge; but the mill could not at that season be worked for want of water, even had it been in working order. Soon after purchasing they set about repairing the dam, which, when finished in April, 1878, was carried away by a freshet, after which plaintiffs proceeded to build another dam, abandoning any idea of working the mill until the increase of water in the autumn should enable them to do so. The mill was destroyed by fire in July, 1878.

Held, that the condition as to defining the occupancy and use had been sufficiently fulfilled by the application which stated accurately the purposes for which the building was erected and intended to be used, and for which it was then used, as far as the season of the year would permit.

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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

In the Supreme Court of Canada.

[*Reported by* GEORGE DUVAL, ESQ., *Advocate, Reporter to the Court.*]

[FEBRUARY, 1881.

QUEBEC.]

GINGRAS, APPELLANT v. DESILETS, *et al*, RESPONDENTS.

Damages—Judgment of the Court of first Instance.

This was an action brought by appellant against the late P. O. Desilets, the original defendant in the cause, claiming a sum of $4,000 damages; 1st, by injurious words, threats and false arrest; 2nd by violence and wounds causing the appellant to have one of his fingers amputated, as well as a long and excessively painful disease, (to wit), the lock-jaw, which put him for a long time in imminent danger of death, and left him crippled and with his general health gravely affected for the future.

The defendant appeared by his attorney, but did not file any plea. After taking the evidence, the Superior Court at Three Rivers condemned the respondents, (the present cause having been continued against them by *reprise d'instance*, as heirs and testamentary executors of the said P. O. Desilets), to pay the appellant the sum of $6,000. On appeal from the judgment of the Superior Court, the Court of Queen's Bench reduced to $600 the amount allowed to the appellant and condemned him to pay all the costs of Appeal.

Held, (Taschereau, J. *dissenting*), that inasmuch as the damages awarded were not of such an excessive character as to shew that the Judge who tried the case had been either influenced by improper motives or led into error, the amount so awarded by him ought not to have been reduced.

O'Gara, Q.C., (with him, *Hould*), for appellant.

Angers, Q.C., for respondents.

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LEVI, APPELLANT v. REED, RESPONDENT.

Jurisdiction—Right of Appeal by plaintiff—Respondent in Court of Queen's Bench—Slander—Verdict by Judge.

The present appellant had sued the respondent before the Superior Court at Arthabaska, in an action of $10,000 damages for verbal slander. The judgment of the Superior Court awarded to the appellant a sum of $1,000 for special and vindictive damages. By the judgment of the Court of Queen's Bench the amount awarded was reduced to $500, and costs of appeal were against the present appellant.

Held, (Taschereau, J., *dissenting*), that the plaintiff, although respondent in the Court of Queen's Bench was entitled to appeal, as in determining *the amount of the matter in controversy* between the parties the proper course was to look at the amount for which the declaration concludes, and not at the amount of the judgment.

Joyce v. *Hart*, 1 Can. S. C. R. 321 reviewed.

Held, also that, as in the case of *Gingras* v. *Desilets*, supra, the amount of damages fixed by the Judge who tried the case ought not to have been reduced.

Geo. Irvine, Q.C., (with him, *Gibson*), for appellant.

Laurier, Q.C., for respondent.

NEW BRUNSWICK.]

DOMINION TELEGRAPH COMPANY, APPELLANTS v. GILCHRIST, RESPONDENT.

Trespass—Right of Company to cut Ornamental trees.

The servants of the company in erecting their line through Norton, King's County, cut down ornamental trees on Dr. Gilchrist's property, claiming the right to do so under their Act of incorporation. In an action of trespass tried at King's County, Dr. Gilchrist obtained a verdict for $235 damages, which was sustained by the Supreme Court of New Brunswick. The company appealed on the following grounds :— 1st. That the practice of the Court not to allow the defendant to cross-examine a witness to prove his plea as decided in *Atkinson* v. *Smith*, 4 Allan 309, was erroneous. 2nd.—That as the company had the right to cut down ornamental or shade trees when necessary for the erection, use or safety of their line, they were the judges of that necessity. 3rd.—That the plaintiff's remedy was under the clause in the company's Act referring to arbitration, and that the jurisdiction of the Court was therefore ousted.

Held, over-ruling these objections, that the company should be held to a strict construction of their Act of incorporation, and were bound to prove

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it was necessary for the erection, use or safety of their line to cut these trees, and having failed to do so, they were liable.

Hector Cameron, Q.C., for appellants.

Weldon, Q.C., (with him *Burbridge*) for respondent.

SNOWBALL, APPELLANT v. STEWART, RESPONDENT.

Action to recover logs—Withdrawal of objectionable evidence from jury—Misdirection.

This was an action brought by respondent against appellant to recover a quantity of logs alleged to have been cut by parties named Sutherland and Kirwan on lands held by Plaintiff under license from the Government. On the trial, the admissions of these parties were received on the plaintiff's counsel undertaking to connect the defendant with these parties. This he failed to do, but called an agent of the Plaintiff to depose as to certain statements of Mr. Snowball. The Chief Justice withdrew the evidence of these admissions from the Jury and directed them that if they thought Snowball admitted he had the logs the plaintiff was entitled to a verdict. The jury found a verdict for the Plaintiff. A new trial was moved for on the following grounds: 1st. That the Chief Justice had no right to withdraw the objectionable evidence admitted by him from the jury. 2nd.—That outside of these statements there was no evidence, and the learned Judge misdirected the Jury on that point. The Supreme Court of New Brunswick discharged the rule, and on appeal to the Supreme Court of Canada it was

Held, that there was no evidence that the logs sought to be recovered had been cut on plaintiff's premises, and that while the Chief Justice had the right to withdraw the objectionable evidence from the jury he had misdirected the Jury as to the effect of the statements made by Snowball to plaintiff's agent.

Weldon, Q.C., for appellant.

Whitmore, Q.C., for respondent.

TEMPLE, APPELLANT v. CLOSE, RESPONDENT.

Trover — Vendor and Purchaser — Property in Goods.

This was an action of trover for bricks. The plaintiff agreed with one Thomas, a brick-maker, who had a kiln of bricks burnt, ready for use, containing somewhere in the vicinity of 100,000 bricks, to purchase and paid for a portion of them, 50,000, according to sample. Thomas delivered to plaintiff 16,000, and the balance of the bricks was taken by the defendant as Sheriff of York, under an execution against Thomas. The

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question to be decided on this appeal was whether the bricks were the plaintiff's property under what had taken place between Thomas and him so as to exempt them from seizure under the execution.

Held, that there was no sale of a specific property under the contract, and that the property in the bricks did not pass to the purchaser until the bricks had been selected.

G. F. Gregory, for appellant.

Whitmore, Q.C., for respondent.

ONTARIO.

In the Court of Appeal.

Q. B.] [1ST. MARCH, 1881.

FRYER v. SHIELDS.

Insolvent Act of 1875—Privileged claim—Action for wages.

The plaintiff sued for wages as a clerk of the defendants who pleaded their discharge in Insolvency. The plaintiff replied that his claim was privileged, and relied upon the 63rd section of the Act as entitling him to recover personally against the Insolvents notwithstanding their discharge to which he had not consented.

Held, reversing the judgment of the Court below for the plaintiff on demurrer to the replication, that privileged claims are not within the class of debts to which a discharge does not apply without the consent of the creditors thereof, and that the remedy of the plaintiff was against the estate of the Insolvents either before or after discharge, and not personally against the Insolvents.

Geo. Kerr, Jr., for plaintiff.

Wm. Mulock, for defendants.

THE AGRICULTURAL SAVINGS AND INVESTMENT SOCIETY v. THE FEDERAL BANK.

Cheque—Forged Endorsement—Liability of Bank paying the same.

One S., by forging an application for a loan and a mortgage in the names of J. T. B. and J. B., and representing certain facts as to the lands to the plaintiffs' agent, procured the completion of a supposed loan. Cheques payable to the order of the supposed borrowers were obtained by S., who forged the names of the payees to the cheques, endorsed his own name,

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and procured payment of the cheques from the defendants, upon whom they were drawn. The fraud was not discovered for some time, during which the cheques were returned to the plaintiffs at the end of the month as paid, whose officers signed the usual acknowledgment of the correctness of the account.

Held, affirming the judgment of the Queen's Bench, that the defendants, having undertaken the responsibil ty of paying cheques payable to order, were bound to pay the proper parties, and that they could not charge the plaintiffs with moneys wrongly paid.

Held, also, that the acknowledgment of the plaintiffs of the correctness of the account at the end of the month was at most an acknowledgment of the correctness of the balance, on the assumption that the cheques had been paid to the proper parties.

Held, also, that the plaintiffs were not estopped from recovering by their agent's negligence, as it did not occur in the transaction itself, and was not the proximate cause of the loss to the defendants.

Bayley, for plaintiffs.

Robinson, *Q.C.* (with him, *J. K. Kerr*, *Q.C.*), for defendants.

C. P.]

PIPER v. SIMPSON & LOWRY.

Lease—Non-Execution of by one Lessee—Action on Covenant for Rent.

The defendants and one C. being in possession of premises under a covenant from the plaintiff for a lease, the plaintiff caused a lease to the three to be drawn, which was executed by the defendants, on the representation that C., the manager of the business, had executed a counterpart thereof. As a fact C. had refused to execute the lease, and had not executed any lease. The defendants and C. continued to occupy the premises, and paid some rent.

Held, affirming the judgment of the Common Pleas, that upon the evidence there was no intention by either the plaintiff or defendants that the latter should be dealt with apart from C., that there was no delivery of the deed, and that therefore the plaintiff could not recover rent in an action upon the covenant.

Bethune, *Q.C.*, for Plaintiff.

Mackelcan, *Q.C.*, for defendants.

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THE CHANCELLOR.]

KEEFER v. MERRILL.

Mortgage of Freehold—Unattached machinery—Fixtures.

A mortgagor of vacant lands adjacent to his stone factory erected thereon a frame building as a lean-to to the factory, and placed in it for the purposes of carrying on his manufacturing business, three lathes, an iron planer, two drills, a crane and a shaper, all of which were kept in position by their own weight without being fastened to any part of the building, with the exception of one drill which was bolted to the frame work, the latter being bolted to the girders. The land was vacant when the mortgage was given and not worth the money, but building was contemplated and there was the statutory covenant in the mortgage to insure for $4000.

Held, reversing the decision of the Chancellor that the machines were not put into the building with the intention of improving the freehold and that they did not become fixtures.

Per Burton, J.A. The question of intention is mainly to be looked at in all cases, the distinctions between them being as to what is sufficient evidence of the intention. The mere fact that machines are brought upon the land by the owner of the freehold raises no presumption that he intends to make them part of the realty though annexation thereto would raise such a presumption.

Per Patterson, J.A. The weight of authority is against construing as fixtures anything which is not annexed in fact to the realty except where the articles form part of the fabric as an integral portion of the architectural design.

McDonald v. *Weeks*, 8 Gr. 297, over-ruled; *D'Eyncourt* v. *Gregory*, L. R. 3 Eq 382, commented on.

Delamere (with him *Black*), for plaintiffs.

W. H. Walker (with him *W. Cassels*), for defendants.

BLAKE, V.C.]

EARLS v. McALPINE.

Devise—Restriction upon alienation—Forfeiture.

A testator willed that his wife should have the use and control of all his property real and personal, until his two sons should become twenty-one, or until the said property should be disposed of as thereinafter mentioned. Then followed a devise to his son W., of half his farm, "to be possessed by him when twenty-one," subject to legacies; and a devise to his son H. of the other half of his farm, "to be possessed by him when twenty-one," subject to legacies. The testator then says: "My two sons H. and W. give to my wife a comfortable support, or the sum of £10 each annually,

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during her natural life * * * I also will that my sons W. and H. do not sell or transfer the said property, without the written consent of my said wife during her life. The will was duly registered at the testator's death. H., after attaining twenty-one, mortgaged his share, without the knowledge or consent of the widow, to the defendants C. and M., who sold on default in the mortgage to O., who bought with notice of the condition, as trustee for M. The heirs at law then filed their bill for partition, claiming that H. had forfeited his estate under the will, by violation of the condition.

Held, affirming the decree of Blake, V.C., that the restriction upon the alienation was valid, and that there was a charge created upon the land for the benefit of the widow; that the mortgage was a breach of the condition annexed to the devise, not to sell or transfer without consent, upon which the heirs-at-law were entitled to enter.

O'Leary, for plaintiffs.

Blake, Q.C. and Bethune, Q.C., for defendants.

KILBOURN v. ARNOLD.

Foreclosure — Fiduciary relation between Mortgagor and Mortgagee — Evidence.

In a foreclosure suit, the defendant set up that the plaintiff, a solicitor, had been employed by him to procure a loan of $1,400, to pay off a mortgage on which there was due some $2,000, and that the plaintiff had taken advantage of this to purchase the mortgage at that price. It appeared that the plaintiff had been applied to by the defendant to procure a small loan, but had been unable to do so; and that he had also acted for B., the mortgagee, in trying to sell the mortgage to a loaning company, but had failed, some time after which, he bought the mortgage himself for $1,625. At the hearing, a decree was made that the mortgage security should stand for the actual amount paid therefor only.

Held, reversing the judgment of the Court below, upon the evidence, that there was no confidential or fiduciary relationship established between the parties, and that the defendant should be ordered to pay the whole amount of the mortgage, or, in default, foreclosure.

Robinson, Q.C. (with him, *W. Cassels*), for plaintiff.

Bethune, Q.C. (with him, *McIntyre*), for defendant.

PROUDFOOT, V.C.]

McGRADY v. COLLINS.

Title by Possession—Evidence.

The plaintiff relied on acts of ownership by another and himself successively, but not in privity with each other, which consisted in their

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driving cattle across a small piece of ground, and across a stream, and watering their cattle in the stream, in order to sustain a bill to restrain the cutting of ice upon a portion of the stream.

Held, affirming the judgment of the Court below, upon the evidence, that the stream was not included in the plaintiff's conveyance, nor was it in his exclusive possession, that the facts were plainly insufficient to support the bill, which was properly dismissed.

Street, for plaintiff.

Meredith, Q.C., for defendant.

HARVEY v. STUART, *et al.*

Partnership—Evidence.

The plaintiffs filed their bill against the defendants S. and T. and three others, charging that a partnership existed amongst them, and alleging that all parties had formed a plan for building an elevator; that it was intended to form a Joint Stock Company, but in order to secure business at once, that the plaintiffs had been authorized to borrow money in anticipation, for the purpose of carrying out the scheme. This they did upon their own responsibility, and the elevator was built and worked, but the efforts to form the Joint Stock Company failed, and they now asked that the alleged partnership be wound up. Various meetings of the parties took place but they were informal, and certain minutes produced were set up by the plaintiffs as correct minutes of the meetings, by which they sought to implicate the defendants. The minutes besides bearing evidence of incorrectness on their face, were proved to be unreliable, and to have been made some time after the meetings. The defendants set up that the plaintiffs had not been authorized by them to raise money, but that while there was every prospect of success that the plaintiffs were anxious to take the risk upon themselves and secure the expected benefits, and that it was only after the venture proved a loss and they had had to disburse largely for it, that they sought to make the defendants contribute. The bill was dismissed at the hearing as against all the defendants except S. and T., and a decree was made declaring that the plaintiffs and S. and T., were as between themselves jointly and severally liable, for the moneys expended, and liabilities incurred in and about erecting the elevator, etc. The defendants S. and T., appealed from this decree. The whole question was one of fact.

The Court was equally divided, Burton and Morrison, JJ. A., being of opinion that the bill was not sustained by the evidence, and that the appeal should be allowed; while Patterson, J. A., Armour, J. concurring with him, was not able to say upon the whole evidence that the learned Vice-Chancellor was wrong in making this decree. The appeal was therefore dismissed.

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Blake, Q.C., with him *E. Martin*, Q.C., for plaintiffs.

McCarthy, Q.C. and *Ferguson*, Q.C., (with them *Bruce*), for defendant Stuart.

Bethune, Q.C., (with him *Mackelcan*, Q.C.), for defendant Turner.

PETERKIN v. MACFARLANE.

Practice—Vacation of decree as against one defendant—Effect of, as to remaining defendants.

A Decree had been made against several defendants, one of them being administrator *ad litem* of an original defendant who died before answering. B., a defendant, appealed from the decree which was vacated as to him and he was allowed to file a supplemental answer and have a new hearing of the cause. The administrator died after decree and another administrator *ad litem* was appointed *pro forma* to represent the estate of the deceased. He was served with no proceedings and it was stated on this argument that the plaintiff asked no further relief against the estate. The administrator obtained from the Referee an order allowing him to file a supplemental answer setting up defences which his predecessor had omitted, which was reversed on appeal to Proudfoot, V.C.

Held, affirming the order of the Vice Chancellor that the vacation of the decree as against B. did not necessarily open the case as against the deceased's estate and that the Referee had therefore no power to allow the administrator to answer while the decree stood as against him.

Robinson Q.C. (with him, *Langton*), for appellant.

W. Cassels, contra.

C. C. YORK.]

BLAND v. EATON.

Contract to procure a Lease—Statute of Frauds—Memorandum, sufficiency of.

The defendant, desiring to enlarge his warehouse by occupying the premises adjoining those in his possession, offered the plaintiff, whose lease of the desired premises was about to expire, $300 to procure from the owners thereof a lease which should be assigned to the defendant, with liberty to open a doorway between the houses. The terms and conditions of the desired lease were left to the plaintiff, who was to make the best terms he could. At the request of the plaintiff that the offer should be put into writing, the defendant wrote to him the following letter:—"To Mr. John Bland—Dear Sir,—In reply to yours of to-day, I propose to give you $300, provided you can give me a transfer lease, with privilege to make an opening between your premises and my own. Cash to be paid

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on completion of transfer lease. This is as I understand it. Yours most truly, T. Eaton." The plaintiff procured a lease and tendered an assignment of it to defendant, who refused it, whereupon the plaintiff sued for the $300.

Held, reversing the judgment of the County Court, that the letter of the defendant was a sufficient memorandum to satisfy the requirements of the 4th section of the Statute of Frauds, within which the agreement fell as being a contract by which the defendant was to receive an interest in land from the plaintiff.

Bigelow, for plaintiff.

J. E. Rose, for defendant.

FISKEN v. O'NEILL.

Insolvent Act of 1875—Sale of debts over $100 en bloc—Validity of.

Held, affirming the judgment of the County Court that section 67 of the Insolvent Act of 1875 giving power to sell the uncollected debts of the Insolvent expressly limits the power to selling in the manner prescribed thereby, that the assignee had no power to sell any debt of more than $100 except by itself, unless in case of a sale of the whole estate; and therefore that the sale *en bloc* to the plaintiff of the uncollected debts of the Insolvent did not pass to him any title to a debt of $324 due the Insolvent by the defendants.

J. E. Rose, for plaintiff.

Murdock, for defendant.

CARROLL v. FITZGERALD.

Feme covert—Separate estate—Wife's earnings—C.S.U.C, cap. 73.

The plaintiff, a married woman who had separated from her husband, earned a sum of money by her own exertions which she lent to the defendant. The husband had never made any claim to the money or to any of the plaintiff's earnings.

Held, affirming the judgment of the County Court, that the money was the separate property of the plaintiff by the acquiescence of the husband in her receiving it which amounted to a settlement, and that the C.S.U.C., cap. 73, which was in force when the money was lent gave the husband no rights which he did not before possess and did not abridge his power so to settle her earnings upon her; but that it operated only as between husband and wife to disable her from insisting that her earnings were not his.

McMichael, Q.C., for plaintiff.

Eddis, for defendant.

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C. C. FRONTENAC.]

OCKLEY v. MASSON.

Agency—Evidence—Statute of Frauds, sec. 17.

Held, upon the evidence that one K., who had made a sale for the defendants to the plaintiffs, had been held out as the agent of the defendants for making sales.

K. entered the plaintiffs' order in a book, and reported the sale to the defendants by letter, which was not produced at the trial, though called for. The defendants wrote the plaintiffs that "K. reports a sale that we cannot approve in full, but will accept for" a certain number of articles. On the plaintiffs' insisting on the whole order, the defendants cancelled it.

Held, that the letter of K. to the defendants was a sufficient memorandum to satisfy the 17th section of the Statute of Frauds, which requires it for evidence only, and that it made no difference that it had passed between the defendants' agent and themselves; and, at any rate, the letter of the defendants to the plaintiffs was a sufficient memorandum of their agent's sale, and its effect was not impaired by the partial disapproval expressed in it.

Reversing the judgment of the County Court.

Robinson, Q.C., for plaintiffs.

Delamere, for defendants.

C. C. WENTWORTH.]

MILLER v. HARVEY.

Insolvent Act of 1875, sec. 134—Note discounted by holder—Payment by Insolvent to Bank.

A. gave a note to the defendants on the 23rd November 1878 which fell due on the 29th January 1879. The defendants endorsed it to the Bank of Montreal and obtained its discount value. It was paid at maturity by one R. out of A's moneys and within 30 days thereafter A. became Insolvent.

Held, reversing the judgment of the County Court, that the defendants stood in a different position from that in which they would have been had they merely endorsed the note to the Bank as their agents for collection; for, having endorsed the note to the Bank for value, the payment at maturity was a payment made to the Bank who where the actual creditors of the Insolvents.

W. F. Walker, for plaintiff.

Crerar, for defendants.

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C. C. CARLTON.]

CRAIG v. DILLON.

Liquidated damages.

The defendant agreed to pay to the plaintiff $200, as liquidated damages. if certain loose stones and a partially constructed stone fence were not removed from the plaintiff's land at the times mentioned in the agreement.

Held, affirming the judgment of the County Court, that the sum mentioned was not a penalty, and that the plaintiff was entitled to recover the sum as liquidated damages on default.

Bethune, Q.C., for plaintiff.

Richards, Q.C., for defendant.

[C. C. OXFORD.

WILSON v. BROWN, *et al.*

Joint and several Promissors—Principal and Surety inter se—Notice of dishonour.

The defendants became parties to a joint and several promissory note made by one H., and themselves as the sureties of H.

Held, affirming the judgment of the County Court, that they came under a direct primary liability to pay at maturity, that on default of payment their liability as sureties became absolute and they could not avail themselves of want of notice that their own note was not paid.

Ferguson, Q.C., for plaintiff.

Robinson, Q.C., for defendants.

Co. J., YORK.] [PATTERSON, J. A.

In re WALKER, AN INSOLVENT.

Joint and separate creditors—Rights as to ranking.

In this case the evidence as to whether the assets were the joint assets of W. & M. or the separate assets only of W. being insufficient upon which to make an order as to how joint or separate creditors should rank, it was

Held generally, on appeal from the County Judge that under section 88 of the Insolvent Act of 1875 if the dividend is derived wholly out of joint estate the joint creditors alone can share until fully paid; if wholly out of separate estate it belongs wholly to separate creditors till they are paid; if partly out of each class of assets it should go *pro rata* to each class of debts. The assignee being in a position to ascertain the character of the assets, it was left to him to adjust the dividends; and under the circumstances costs were allowed to all parties out of the estate.

W. Mortimer Clark, for Inspectors, the appellants.

W. Mulock, for claimants.

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In the Queen's Bench.

[11TH MARCH, 1881.

MONDS v. MARTIN.

Replevin—Illegal distress—Evidence of lease—New Trial.

In an action of Replevin the jury found for the defendant, who disagreed with the plaintiff as to the terms of the alleged lease. The defendant was supported by one W., who took down instructions for a lease which he produced. The lease was not drawn, because the defendant, the landlord, being defendant in ejectment upon a mortgage in default was arranging through W. for a loan to pay off the mortgage. After the trial a letter of W.'s was discovered, which had been written to a Loaning Company, and referred to the plaintiff's being tenant, and supported to a certain extent the plaintiff's story. A new trial was granted, as it was uncertain whether there was a lease or an agreement for one only.

McCarthy, Q.C., for plaintiff.

Lount, Q.C., for defendant.

PECK v. PHŒNIX MUTUAL INSURANCE COMPANY.

Fire Insurance—Material alteration in premises—Notice of.

The plaintiff's premises being insured as "occupied by a tenant as a grocery store and dwelling," were re-let to his son-in-law, who used them for dealing in furniture, and had a small room behind the shop in which he had a carpenter's bench and tools, and did repairing and rough work. D., the defendants' local agent, was notified of this change, and went on the premises and saw the tenant at work making a secretary. He wrote to the Head Office at plaintiff's request, notifying them of this, and they answered that if the policy were sent they would consent in writing on it. The policy contained a condition that "any change material to the risk and within the control or knowledge of the assured shall void the policy as regards the part affected thereby unless the change be promptly notified in writing to the company or its local agent, and the company so notified may * * cancel the policy. * * *

The jury found for the plaintiff.

Held, that the verdict should not be disturbed, as the jury had fairly found the notification of the change sufficient.

Semble, that the transmission of the policy for endorsement was not essential if the communications were reasonably sufficient.

Meredith, Q.C., for plaintiff.

Bethune, Q.C., for defendants.

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ST. JOHN v. BULLIVANT.

Trover.

The plaintiff was mortgagee of sixty-four shares in defendant's propeller, and on defendant's insolvency was allowed by the creditors and assignee to take the vessel as she stood at a valuation. Before this time the defendant had removed from the vessel a piano and several other articles, and had substituted stoves for steam heaters.

Held, that the plaintiff was concluded by the settlement with the assignee, by which he took the vessel as she then stood, in the absence of fraud, and could not recover these articles. The mortgagor being in possession had a right to manage the vessel according to his good discretion by removing articles on board or substituting others for them.

Semble, that a piano on board a vessel would not pass to the mortgagee under such general words as "with her boat, guns, ammunition, small arms and appointments."

McClive, for plaintiff.

Bethune, Q.C., for defendant.

LUMSDEN v. DAVIES.

Sale of goods upon conditions as to re-purchase—Statute of Frauds.

The defendant sold to the plaintiffs a quantity of tea, and agreed that if the plaintiffs after trying to dispose of the same had any left upon their hands at a certain date that he, the defendant, would re-purchase it at an advance of ten cents per pound. The tea was delivered, and upon the defendant's refusal to buy back what was left on the plaintiff's hands at the date named this action was brought for the breach.

Held, that the whole agreement consisted of one conditional contract of sale and not of two contracts; and that the delivery of the tea by the defendant therefore satisfied the Statute of Frauds.

Osler, Q.C., for plaintiffs.

Ferguson, Q.C., for defendant.

LAPOINTE v. LAFLEUR.

Ejectment—Reservation of certain quantity of land from conveyance—Time of Selection.

Defendant conveyed to his son, J. L., jun., the E. ½ of a lot, "reserving from the operation of these presents unto the said parties of the first and second parts (the latter being defendant's wife), during their joint lives, and during the life of the survivor, one acre of the said lot hereby conveyed, the same acre to be taken in any part of the said hereby conveyed, when the said parties of the first and second parts see fit." De-

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fendant continued to live on the lands with his son till the latter's death, in 1876. Several years before his death, J. L., jun., built a small house on the land which was occupied by his men till his death. After his son's death, the defendant went off the land, but returned in about a year, and lived in the small house built by his son, and improved the same. The mortgagees of the son sold to the plaintiff under the power in their mortgage, and the defendant, at the sale to the plaintiff, on being asked, said he had not selected his acre, was then asked to do so, and then selected the part where he was living. The plaintiff was present and heard this, and his conveyance was "subject to the reservations contained in the deed from J. L., sen., to J. L., jun."

Held, that the reservation in the deed from defendant to his son was more properly an exception than a reservation, and that an estate for the joint lives of defendant and his wife and for the life of the survivor, remained in the defendant, and he therefore was entitled to select the acre at any time, and was not bound to do so in the life-time of his son.

Burnham v. *Ramsay*, 32 U. C. R. 49, distinguished.

Bethune, *Q.C.*, for plaintiff.

A. Cassels, (with him *W. N. Ponton*,) for defendant.

PATTERSON v. THOMPSON.

Illegal distress—Replevin—Exemption from distress of goods brought to be manufactured.

The exemption from distress of goods entrusted to persons carrying on certain public trades to exercise their trades upon them is a privilege grounded on public policy for the benefit of trade.

In this case saw-logs were taken to a saw-mill by the plaintiff, to be converted into lumber in the due course of business of the mill.

Held, that the business of sawing lumber for hire is a trade in which is exempted from distress for rent, the property of a stranger brought in to be converted into lumber, and that the plaintiff was entitled to recover; and this, notwithstanding that one of the tenants of the saw mill appeared to have an interest in the saw-logs, jointly with the plaintiff.

Lount, *Q.C.*, for plaintiff.

McCarthy, *Q.C.*, for defendant.

INGRAM v. TAYLOR.

Interpleader—Liability to seizure of crops in hands of guardian.

A testator in 1873 devised the west half of his farm to the plaintiff in interpleader, his son's wife, and the heirs of her body during the life of her

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husband, and the east half to the son of the plaintiff; it appearing on the evidence that the object of the testator in so disposing of his property was to prevent it from becoming liable under a judgment previously obtained against his son, the husband of the plaintiff. The plaintiff attended to the management of both her own portion and that of her son, her husband working under her directions. The defendants seized the crops in execution under the judgment against the husband of the plaintiff above referred to, part of which said crops had been grown on the plaintiff's portion, and part on that of her son.

Held, on the evidence, with regard to that portion which had been raised on the plaintiff's land, that a verdict was properly entered for the plaintiff in interpleader. *Lett* v. *Commercial Bank* distinguished; and law as to Married Women commented on.

Held also, with regard to the portion grown on the land of the plaintiff's son, that although, had the husband of the plaintiff worked and used the land himself, the property in the crop would, at common law, have been in him, as guardian of his son, subject to the right of his son to an account, yet, inasmuch as the plaintiff had worked the whole farm, supplied the necessary seed, and expended all that had been spent in raising the crops seized, the facts did not warrant the application of the common law rule, and a rule to set aside the verdict for the plaintiff on that point was consequently discharged.

Bethune, *Q.C.*, (with him *J. W. Kerr*,) for plaintiff.

McCarthy, *Q.C.*, for defendants.

FLEURY v. COPELAND.

Sale of goods "to arrive"—Construction of.

A contract for the sale of goods "to arrive" does not constitute a conditional contract rendering the vendor liable only on the condition of the arrival of the goods. The term is properly applied where goods are either in transit in a named vessel or about to be shipped at a named port in some particular manner.

G. H. Watson, for plaintiff.

J. E. Rose, for defendant.

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In the Common Pleas.

[11TH MARCH, 1881.

CLARK v. FARRELL.

Stat. Anne, cap. 14, sec. 1—Claimant of goods seized—Non-removal from demised premises.

In this case on appeal to the full Court the judgment of Cameron, J., noted *ante* p. 133, was affirmed with costs.

J. Crickmore, for plaintiff.

McCarthy, Q.C., (with him, *J. B. Clarke*), for landlord.

Bethune, Q.C., for the Sheriff.

ABELL v. McLAREN.

Pleading—Embarrassing pleas—C. L. P. Act.

In this case it was contended that the power to strike out a plea as embarrassing under the C. L. P. Act, R. S. O., cap. 50, is confined to the case where the pleading is in its terms embarrassing, viz., where it is confused, unintelligible, complicated or involved in statement, or otherwise so as to be difficult to understand; but does not extend to cases where, though containing an intelligible defence the same or a similar defence has already been set up by other pleas on the record, or when it contains unnecessary verbiage or statements of fact or combines several defences.

Held, that this was too restricted a construction to give to the Act.

Riordan, for plaintiff.

Ferguson, Q.C., for defendant.

LEVINE v. CLAFLIN.

Feme Covert—Separate trader—Evidence.

On an interpleader issue to try the title to certain goods claimed by the plaintiff, a married woman, as acquired by her in carrying on a trade separate from her husband in the City of Hamilton, within the meaning of the Married Women's Property Act, R. S. O., cap. 125, or otherwise as against the defendants, execution creditors of the husband,

Held, upon the evidence set out in the case that the plaintiff's title had failed, for not only did it appear that the goods with which the business was opened up, which were brought from Cincinnati, Ohio, where the plaintiff and her husband formerly resided, were according to the law thereof, though claimed by the wife as hers, the goods of the husband; but that the business, though carried on in the name of the wife, was in fact the husband's.

Bruce, for plaintiff.

E. Martin, Q.C., for defendant.

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In re NORTH OF SCOTLAND MORTGAGE COMPANY AND THE CORPORATION OF THE CITY OF TORONTO *et al.*

Assessment and taxes—British Company—Personal Property—Liability to Assessment—43 Vict., cap 27. sec. 3 (O.)—Ultra vires.

The plaintiffs were a company incorporated under the Imperial Companies' Acts of 1862 and 1867, for the purpose of lending money on real estate or on public securities, etc., the registered office of which was in the City of Aberdeen, Scotland, but having an agency in Canada. All the income or profits of the company arising from the business in Ontario, after deducting expenses of management, were remitted by the General Manager at Toronto to the said registered office at Aberdeen, where all dividends were declared and paid, and where they were liable to assessment, and were actually assessed under the laws of Great Britain. The Corporation of the City of Toronto acting under the 43 Vict., cap 27, sec. 3 (O.) which provides that all personal property within the Province, tne owner of which is not resident therein, shall be assessable like the personal property of residents, assessed the plaintifts for a large amount of personal property.

Held, that the Statute was not *ultra vires* of the Provincial Legislature, and that the company came within its provisions; and the assessment was therefore held valid.

Bethune, Q.C., (with him *Falconbridge*) for the company.

Robinson, Q.C., (with him *McWilliams*) for the City.

REGINA v. BROWN.

Extradition—Foreign Indictment—Sufficiency—Statutes in force.

Held, that the 40 Vict. cap. 25 (D.) relating to extradition of fugitive criminals is not in force, but that the law and practice is to be found in the Ashburton Treaty Art. X., and the Statutes 31 Vict., cap. 94 (D.) 33 Vict. cap. 25 (D.), and the Imperial Act 33 and 34 Vict. cap. 52.

On an application for the extradition to the United States of a person charged with murder therein,

Held, (Osler, J., dissenting) that under the above acts a certified copy of an indictment for murder found by the Grand Jury of the said Foreign Country, to wit, Erie County, State of New York, was sufficient evidence of such charge to warrant the extradition.

Per Wilson, C. J., and Osler, J. The other evidence set out in the case documentary and *viva voce* was insufficient.

Per Galt, J. Though in doubt as to the sufficiency of the indictment by itself, it was sufficient when taken in connection with the other evidence.

J. K. Kerr, Q.C., for the Crown.

McMichael, Q.C., for the prisoners.

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QUINLAN v. THE UNION FIRE INSURANCE COMPANY.

Insurance—Statutory conditions—Buildings within one hundred feet—Failure to give notice of—Diagram by agent after personal inspection—Evidence.

The first statutory condition endorsed on a policy of insurance provided that if any person insures his building or goods and causes them to be described otherwise than as they really are to the prejudice of the company or misrepresents or omits to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk and undertaking, such insurance shall be of no force in respect to the property to which the misrepresentation or omission is made. The second statutory condition so endorsed, provided that after application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application unless the company point out the difference relied on; with a variation added, that such application or any survey, plan or description of the property to be insured shall be considered a part of the policy, and every part of it a warranty by the assured; but the company will not dispute the correctness of any diagram or plan prepared by its agent from a personal inspection The 20th condition as varied, provided that in case any agent takes any part in the preparation of the application for the insurance he shall with the exception above provided in case of a diagram or plan be regarded as the agent of the applicant. By the application which was signed, not by the applicant, but by the agent, the applicant was required to make known the existence of all buildings within 100 feet of the insured premises, and it appeared that the applicant had omitted to make known the existence of a small building used for storing coal oil within such distance. A diagram was made and filled in by the agent, and signed by him in his own name, as well as in the name of the insured, which contained no reference to this building. The diagram was not made from a personal inspection at the time, but from a previous inspection and the knowledge thereby acquired.

Held, that even if by the above conditions the plaintiff would be relieved from the effect of the omission to make known the existence of such building where the diagram was made by the agent from a personal inspection there was no such personal inspection here.

Bethune, Q.C., (with him, *Dixon*), for plaintiff.

McCarthy, Q.C., (with him, *A. C. Galt*), for defendant.

ROBBINS v. THE VICTORIA MUTUAL INSURANCE COMPANY.

Mutual Insurance Company—Failure to deliver proof within thirty days—Mistake—Recovery.

Upon a policy issued by a Mutual Company the statutory conditions were endorsed with variations, one of which was, and which was the same as sec. 56 of the Mutual Act, R. S. O., cap. 161, that the proofs, declara-

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tions, etc., called for by the statutory conditions should be furnished to the company within thirty days after the loss, etc. The loss occurred on 2nd October, 1878, and on the 5th the plaintiff notified defendants by letter. A few days after the plaintiff saw one S., an agent of the defendants for obtaining applications, but not for settling claims; but who had acted for plaintiff in settling a previous loss with defendants, and asked him to act for him on this occasion, and do whatever was proper, which S. promised to do. On 17th October the defendants' President came up and saw plaintiff, who informed him of the loss and all the circumstances relating thereto, and plaintiff was told by him in answer to his inquiry that nothing further need be done. The plaintiff in consequence did nothing; but subsequently on hearing that the defendants disputed the claim some correspondence took place which resulted in plaintiff's employing a Solicitor, and proofs were therefore put in; but after the lapse of the thirty days.

Held, (Osler, J., doubting), that sec. 2 of the R. S. O., cap. 162, applies to Mutual Companies, and as the evidence showed that the non-compliance with the condition as to putting in proof within thirty days was by mistake, the plaintiff was protected, and was therefore entitled to recover.

Lennox, for plaintiff.

McCarthy, Q.C., for defendants.

THE PROVINCIAL INSURANCE CO. v. CAMERON, EXECUTRIX

Company—Stock—Power of Attorney—Calls—Advertisements.

There were, besides this action, an action against the defendant in her own right, and actions against five other defendants, the same being for unpaid calls on stock. The stock held by the defendant Cameron, in both above capacities, was transferred under power of Attorney.

Held, that there was sufficient evidence given of the existence of such power of Attorney, and excusing the non-production to let in secondary evidence thereof; and also, that the evidence showed that such shares had not been forfeited.

Under the Statutes relating to the company, it appeared that the name of the company had been changed; but it was held that under the circumstances it did not affect the plaintiffs' rights.

It was objected that the shares of certain of the shareholders had been illegally forfeited; but held that, even if illegally forfeited, no harm was done, as they were still liable thereon; but that under the said Acts the directors had power to forfeit.

Held, that under the said Acts the directors could make more than one call at the same time so long as they allowed thirty days after the publication of the notice for the payment of each call.

Held, also, that under the said Acts it was not obligatory on the company to give notice of each call made in one or more of the several newspapers published in every district, where stock was held before suing any of the shareholders, who had received such public notice of the call in a newspaper published in his or their district or districts.

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Held, also, that a variation in the days of payment in the resolution making the call and its public notice in the newspaper would render the calls invalid.

Objections were also taken to certain resolutions, passed subsequently to the resolutions making the calls, which, it was contended, had the effect of severally extinguishing the calls, and giving preference to certain shareholders, but such objections were held untenable.

Robinson, Q.C., (with him, *Huson Murray*), for plaintiffs.

Bethune, Q.C., *Snelling*, *Tilt*, *Biggar* and *Worrell*, for the several defendants, except E. C. Jones, who appeared in person.

GREEN v. HAMILTON PROVIDENT LOAN SOCIETY.

Mortgage—Building Societies—Non-members subject to Rules—Default in Mortgage—Amounts recoverable—Purely money demand—Release—C. S. U. C., cap. 53; 37 Vic., cap. 50, sec. 3, (D).

By section 3 of 37 Vic., cap. 50 (D.), borrowers from building societies, incorporated under C. S. U. C., cap. 53, though not members of the society or signing the rules, are made subject to all such rules in force at the time of becoming borrowers.

In an action against the defendants, such a building society, by the plaintiff, a second mortgagee, on the common counts to recover certain moneys claimed to be due after the payment of the defendants' claim,

Held, under such rules the society on a sale of the land under a mortgage given by such borrower to the society, on default before the expiration of the term fixed by the mortgage, was not restricted to the amount originally advanced with the accrued interest, but was entitled in addition to the original principal to discount the future repayments at such rate of interest and on such terms as the directors might determine; and that the surplus after the deduction of this sum, together with all payments, moneys and expenses due to the society, was to be paid to the mortgagor.

The costs of sale and commission thereon were held to be properly chargeable, but not a charge for insurance and survey, or the costs of an action on the covenant as not coming within the rules.

It was objected on the argument that the plaintiff could not maintain the action as a subsequent incumbrancer as a purely money demand under sec. 4 of the A. J. Act, R. S. O., cap. 49; and that it was necessary that the original mortgagor should have been a party to the suit; but the plaintiff having put in a release from the mortgagor which, it was said, was used at the trial though not filed, of all moneys which he might be entitled to receive from the company as proceeds of the sale or otherwise, the objection was not entertained.

Creelman, for plaintiff.

Bethune, Q.C., (with him, *Crerar*), for defendants.

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TURLEY v. BENEDICT.

Lease—Estate for life—Conditions.

Under an Indenture made in pursuance of the Act to facilitate the leasing of lands and tenements, between A. B., of the first part, and D. B. and L. B., his wife, of the second part, it was witnessed that the party of the first part agreed to lease to the parties of the second part certain land described, "To have and to hold during their natural life all the privileges and appurtenances of the above-mentioned land, with the exception of the hop yard," etc. "And the party of the second part is to have hold work and enjoy during the natural life or less, or while they have their natural reasoning faculties and in their right minds; and should the party of the second part, either or both of them be deprived of reasoning faculties or incapable of manual labour, they are to have their support in a comfortable and respectable manner while they shall live from the party of the first part; should the party of the second part be incapable of taking charge of the place in his after years, as it should be done by good husbandry, then the party of the first part govern the above-mentioned lands as seems best to him: The party of the second part, should he require it, shall have the first privilege of dressing and packing his hops, should he have any to dry at a reasonable price after the expiration of P.'s lease; with the exception of the party of the first part, the party of the second part is to have peaceable and quiet enjoyment."

At the trial the jury found that after the lease D. B. did not cease to possess his reasoning faculties, etc., but that he did become incapable of manual labour and was incapable of taking care of the place, as it should be done by good husbandry.

Held, that under the Indenture a freehold estate for life was conveyed; and that such estate was never defeated, for that the finding of the jury disposed of the contingency of the habendum which was strictly a limitation, and as to the other provisions of the lease, they could not be deemed to be conditions on the happening of which the estate became forfeited.

Clute, for plaintiff.

G. D. Dickson, for defendants.

In Chancery.

[REHEARING., 23RD FEBRUARY, 1881.

MYLES v. NOBLE.

Voluntary Conveyance—Evidence.

Where a son had obtained a deed from his father, which was expressed to be in consideration of natural love and affection, and $100, but was really made in consideration of work done by the son and money paid by him for his father, the deed was attacked under the Statute of Elizabeth.

Held, that evidence might be received to prove what was the real valuable consideration, and that the one consideration might be discarded and the other supported, on proof of a valuable consideration.

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Semble, that there should be less difficulty in this country than in England, in admitting evidence to show the true consideration of a deed, on account of the more prevalent practice here, of expressing some other than the true consideration therein.

Boyd, Q.C., for plaintiff.

Moss and *Beynon*, for defendants.

Vacation Court.

[ARMOUR, J., 1ST MARCH 1881.

In re McCORMICK AND THE CORPORATION OF THE TOWNSHIP OF COLCHESTER, SOUTH.

Proposed school house—Submission to electors—Sufficiency of.

It appeared from the affidavit of the Secretary and Treasurer of a school section, that at two regularly called meetings of the duly qualified electors of a school section at which a chairman was appointed, proposals to purchase a site, build a school house, and borrow money therefor, were put by way of motion and carried, upon which a by-law was passed authorizing the issue of debentures to raise money for the above purposes.

Held, that under 42 Vict., cap. 34, sec. 29, subs. 3, this was a sufficient submission to, and approval of the proposal by the duly qualified electors of the section, and a rule to quash the by-law was discharged.

Moss, for the rule.

J. K. Kerr, Q.C., contra.

[CAMERON, J., 8TH MARCH 1881.

In re RUSHBROOK AND STARR.

Award—Validity of—Oaths of witnesses dispensed with.

Held, that under R.S.O., cap. 50, sec. 224 it is imperative that the witnesses upon an arbitration should be examined upon oath, unless a positive agreement is made between the parties to dispense with sworn testimony. And such consent, if given, may be shown *dehors* the submission, rule or order of reference.

McMichael, Q.C., for the award.

J. E. McDougall, contra.

[ARMOUR, J., 11TH MARCH, 1881.

REGINA v. GRAINGER.

Illegal issue of License—Conviction—Certiorari.

A certiorari will not lie to remove a conviction under "The Liquor License Act," R. S. O., cap. 181, sec. 48, for issuing a license contrary to the provisions of the said Act, the procedure being regulated by 32 and 33 Vict., cap. 31, sec. 9 (D) as amended by 33 Vict., cap. 27 (D).

McMichael, Q.C., (with him, *A. Dougall*), for defendant.

Hodgins, Q.C., for the Attorney General.

G. D. Dickson, for prosecutor.

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Common Law Chambers.

[OSLER, J., 17TH FEBRUARY, 1881.

LOUNT v. CANADA FARMERS' INSURANCE COMPANY.

Execution—Mutual Insurance Company—R. S. O., cap. 161, sec. 61.

Under R. S. O., cap. 161, sec. 61, writs of execution against a Mutual Insurance Company cannot be issued until after the lapse of three months from the recovery of judgment.

Held, on appeal from Mr. Dalton that this section applies equally in the case of a policy issued on the cash principle, and of one upon the premium note system.

[18TH FEBRUARY, 1881.

POWITT v. FRASER

Arrest—Attachment—Costs—R. S. O. cap. 50, sec. 343.

Defendant was arrested and held to bail for a debt alleged by plaintiff to be $704. As to $80 of this, plaintiff had no reasonable ground for believing defendant to be liable, and he abandoned it at the trial.

Held, that defendant was entitled to tax his costs of defence against the plaintiff, under R. S. O., cap. 50, sec. 343.

[1ST MARCH 1881.

REGINA, *ex rel* MITCHELL v. DAVIDSON.

Quo Warranto—Disclaimer—Costs.

Defendant admitted that he was disqualified from holding the office of Councillor, and, before the issue of the writ of *quo warranto* sent the following memorandum to the Council:—"Palmerston, Feby. 7th, '81. To the Mayor and Council of the Town of Palmerston, Gentlemen, I beg to disclaim my seat at the Council board. (Signed) G. S. Davidson."

Held, that the above disclaimer was not sufficient to disentitle the relator to costs.

Chancery Chambers.

[THE CHANCELLOR.

In re GLEASON, GLEASON v. GLEASON.

Administration—Local Master—Opposed Application—Practice.

A legatee applied to the Master at Woodstock for an administration order under G. O. 638, and the defendant, the executor, in answer to the application, set up a release from the plaintiff to himself.

The Master thought as the application was opposed, that he should refer the matter to a Judge in Chambers by analogy to the practice laid down in G. O. 561, concerning opposed applications before the Referee.

The matter accordingly came before a Judge in Chambers, when it was

Held, that G. O. 561, did not confer any power to refer opposed applications for administration, under G. O. 638, to a Judge in Chambers, but that such applications must be disposed of by the Master.

Inasmuch, however, as the Master could not give the plaintiff liberty to file a bill attacking the release, and as the parties consented thereto, his Lordship entertained the application.

H. Cassels, for plaintiff.

Hoyles, for defendant.

(Reported by H. Cassels, Esq., Barrister-at-law.)

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THE

CANADIAN LAW TIMES.

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THE COMMITTAL OF JUDGMENT DEBTORS.

THE case of *Merrill* v. *McFarren*, reported in 1 C. L. T. Occ. N., p. 133, is of considerable interest, and if it be sound, a judgment debtor occupies anything but an enviable position.

We give the facts a little more fully than they are set out in the reported note of the case: An order was obtained for the examination of the defendant as a judgment debtor, and, at the examination, the defendant apparently disclosed all his circumstances frankly and without evasion; showing that he was possessed of no real or personal property except a sum of money which he then had in his pocket amounting to about $700. He further explained that this money was the proceeds of a bet laid on the Hanlan-Trickett boat race. Counsel for the plaintiff then demanded that the defendant should hand over this money to the plaintiff; but the defendant replied that he was advised that he need not do this, and counsel for the defendant argued that the defendant was fully justified in refusing to do so, upon the ground that the defendant's duty on his examination was simply to answer fairly and truthfully the questions put to him, and that the examiner had no power or authority to compel the delivery up of the money. At the request of counsel for the defendant, the examiner made a note in his report that,

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in his opinion, the defendant had conducted himself quite properly during his examination, and had answered satisfactorily the questions put to him.

The plaintiff afterwards obtained a summons, under the provisions of R. S. O., cap. 50, sec. 305, to commit the defendant for contempt in not making satisfactory answers to the questions put to him. The section reads as follows: "In case such debtor does not attend, and does not allege a sufficient excuse for not attending, or if attending he refuses to disclose his property or his transactions respecting the same, or does not make satisfactory answers respecting the same, or if it appears from such examination that such debtor has concealed or made away with his property in order to defeat or defraud his creditors or any of them, such Court or Judge may order such debtor to be committed to the common gaol of the county in which he resides, for any time not exceeding twelve months, etc., etc."

Upon return of the summons Mr. Justice Galt made an order that the defendant be committed to gaol for three months for not making satisfactory answers to the questions put to him upon his examination. Rather than go to gaol the defendant paid the $700; but, as the order did not provide for his discharge upon payment, an application had to be made to vacate the order and thus purge the defendant of his alleged contempt.

For some reason the examiner had not filed that portion of his report which testified to the defendant's answer being satisfactory in the examiner's opinion; but this was shewn upon affidavit on the application for the defendant's discharge, and notwithstanding this, the defendant was ordered to pay the costs of the application, which shews that this fact had no influence upon the learned Judge's finding.

Now, attendance being out of the question for the present, it will be observed that the Court may act upon the arising of any of three conditions:—(i) The refusal to disclose his property or transactions touching the same. (ii) The making unsatisfactory answers. (iii) The disclosure of fraud in his transactions.

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Taking the case as it stands under the second head, where the only contest is as to whether the judgment debtor has, or has not, given satisfactory answers respecting his property or his transactions respecting the same, two questions naturally arise for determination: 1.—What is a satisfactory answer within the meaning of the clause in question? 2.—Who is the proper person to decide whether an answer be satisfactory or not?

In reply to the first of these questions it appears to us that an answer is satisfactory which, in the opinion of the person who is to decide upon the matter, gives a full, fair and unevasive reply to the matters embraced in the particular question; and that the term, "satisfactory answer" does not mean such an answer as will satisfy the plaintiff, much less the plaintiff's claim. An unqualified negative cannot be said to be an unsatisfactory answer, if we except the consequent disappointment of the interrogator, which we apprehend is not within the Statute. A tacit refusal to pay a judgment is an unsatisfactory answer to the order of the Court to pay, but no penalty of imprisonment awaits the disobedient debtor. An unsatisfactory answer, properly means an answer which by its qualifications or evasions does not meet fairly and reply to the question. That this is the proper legal meaning of the term seems to be fully borne out by decisions in which somewhat similar questions have arisen (*a*).

In order to justify a commitment for not answering satisfactorily, it must be shewn that the question which is alleged to have been unsatisfactorily answered was a material question (*b*).

Now it appears to us that a question asked of a judgment debtor whether he will pay over money which he has in his pocket, is not, in a legal point of view, a material question; and that at all events, it is satisfactorily answered by a simple negative. Answers are not to be deemed un-

(*a*) *Ex parte Oliver*, 2 Ves. & B., 244; *Schneider* v. *Agnew*, 6 Pr. R., 338.
(*b*) *Ex parte Baxter*, 7 B. & C., 673.

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satisfactory merely because they do not account for the application of the defendant's assets in a proper manner (*c*).

It must be remembered that proceedings under the Statute in question are of a penal nature, and therefore a clear offence should be shewn to warrant a commitment. In the case of *Lemon* v. *Lemon* (*d*), it was held that the debtor must have *contumaciously refused to answer*, or so *equivocated* as to render his answer no answer at all, before he could be said to have given "unsatisfactory answers."

If the principle of the decision under review be correct, and a judgment debtor have never so small a sum of money on his person, or even an unnecessary gold ring, the gift of a friend or otherwise, and if he refuse to hand it over to the judgment creditor upon an examination of this kind, an order must go for his imprisonment for contempt for any period under twelve months. That such is the state of our law we do not believe, and that such ought to be its state, we think very questionable. Our consideration of the question so far, merely leads up to this proposition, that the order made was, in effect, an order to commit for non-payment of money, a proceeding which we supposed to have been long ago abolished (*e*).

The latter case contains words so applicable in general terms to this subject that we make an extract from it. Spragge, C. says:—"The decree directs the executor to complete the purchase within a week, and to convey to the plaintiff within another month. The decree has not been obeyed, and the plaintiff applies *ex parte* for an order to commit. The first thing is to complete the purchase, and the substantial thing, as appears by the bill, is to pay the purchase money. I think if I were to order the defendant to be committed, it will be in reality for non-payment of

(*c*) *Hobbs* v. *Scott*, 23 U. C. R., 619.

(*d*) 6 Pr. R., 181.

(*e*) C. S. U. C., cap. 24, sec. 13. R. S. O., cap. 67., sec. 10. *Male* v. *Bouchier*, 2 Ch. Cham., 254.

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money, and that I should contravene the Statute. It is not suggested that the money has been paid or that the disobedience to the order consists in something else. If that were done, I should give the order; that not being shewn, I should run the risk of committing for non-payment of money, and that with my eyes open, for I have reason to infer that in that consists the real disobedience." So it seems that an order to pay money, whether it be an order of the Court of Chancery or a rule or order of a Court of Law, may be disobeyed without the fear of imprisonment, because in the words of the Statute above cited "process of contempt for non-payment of any sum of money or for non-payment of any costs, charges, or expenses payable by any decree or order of the Court of Chancery or of a Judge thereof, or by any rule or order of the Court of Queen's Bench or Common Pleas or of a Judge thereof, is abolished."

In the case under review there was no order to pay, save the judgment. The refusal was simply the refusal of a request made by a party through his attorney. To distinguish between the tacit disobedience implied in the disregard of an order for payment, and the express verbal refusal to pay, seems to be merely to play upon the words of the Statute. The defendant, by a simple negative, merely refuses to hand over certain bank notes, as he might, on such an occasion, lawfully refuse to convey a hundred acres of land to the plaintiff, and says to the plaintiff in effect—you are remitted to your remedy by execution according to the practice of the Courts. I give you all the information in my power, and you are at liberty to use every writ of execution the Courts can give you. Thereupon the Court does execution by giving the debtor's body into custody, which seems to us to be a complete revival by a side-wind of imprisonment for debt.

It rarely happens, no doubt, that the money which a judgment debtor has in his pocket, has found its way there in any other manner than by a disposal of his property with intent to defeat or defraud creditors. And

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where, in an isolated instance, it happens otherwise, we do not think our law, as it stands at present, is capable of reaching it, or of imprisoning the debtor for non-payment.

In reply to the second question above proposed, it is submitted that the examiner himself should be the person with whom should lie the determination of whether the answers have been satisfactory.

In all cases in our Courts where questions arise as to the conduct or credibility of witnesses, great weight is attached to the opinion of the Judge or presiding counsel before whom the witnesses were examined, because he has had an opportunity of observing their demeanour and manner of giving testimony. A doubt has been cast upon the efficacy of this doctrine of demeanour, by a certain dictum in one of the judgments delivered by the Court of Appeal, on the first of March last, in *Harvey* v. *Stuart*, which was an appeal solely on a question of fact; but we apprehend that this will not affect the reasoning in the present case. Assuming, therefore, the doctrine to be unimpaired, surely a similar line of reasoning points to the examiner, in cases of this kind, as the proper person to decide on the point of an answer being satisfactory or otherwise. Most of the English decisions in reference to these proceedings, arise under the Bankruptcy laws, and there the commissioners before whom the bankrupt is examined, are the persons who decide upon the quality of the answers (*f*).

Our examination of this decision has confined us to a consideration of the second head above mentioned. A refusal to disclose property or transactions respecting it, is more easy to define, more easy to detect, and is very properly punishable with imprisonment. But we doubt whether, on an enforced disclosure of its whereabouts it could be reached in any other way than by seizure under execution. The disclosure of fraud is perhaps more difficult to accomplish, though quite as properly punishable by imprisonment. The fact that a man has in his posses-

(*f*) *Ex parte Oliver*, supra; *Ex parte James*, 3 Dea. 518.

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sion property as to which he gives full information, and as to which he discloses no fraud in the transactions touching the same would seem to take his case out of the Statute. The case suggests the imperfection (if such it may be called) of the Statute in just stopping short of enacting that a man able to pay a debt, and refusing to do so, should be deemed guilty of defrauding or attempting to defraud his creditors, and so punishable by imprisonment.

ANONYMOUS.

A SPUR TO THE BENCH.

The *Chicago Legal News*, 19th March, 1881, calls attention to the opinion of MORRISON, C.J., of the Supreme Court of California, at page 223 of the same issue, construing the following provision of the Constitution of that State: — "No Judge of a Superior Court nor of the Supreme Court shall, after the 1st day of July, 1880, be allowed to draw or receive any monthly salary, unless he shall take and subscribe an affidavit, before any officer entitled to administer oaths, that no cause in his Court remains undecided that has been submitted for decision for the period of ninety days." The *Chicago Legal News* says that the great delays in some of the Courts amounted to a denial of justice, and thinks the provision a reasonable one.

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ELECTION OF BENCHERS.

A movement commenced several weeks ago among the junior members of the Bar in Toronto, towards obtaining the election of several of their number as Benchers for the next five years—not interfering with the choice of the greater portion of the Bench from the leaders in the profession. With this object in view, a small number collected and formed the nucleus of a larger meeting, which took place in the examination room at Osgoode Hall; Mr. J. Harry Ferguson being in the Chair. The question was discussed *pro* and *con*, and the opposition came altogether from men of the same standing—none of the older members of the Profession being present. The meeting was adjourned on a division, without a direct vote being taken upon the main question. Nevertheless, the feeling against admitting junior members of the Bar to a seat in Convocation, was in the ascendant.

The perseverance of the promoters, however, was not spent, and another meeting was held on the evening of the 18th of March, in the same place, Dr. Larratt Smith presiding, and several senior members of the Bar being present. A resolution was moved by Mr. Worrell, seconded by Mr. H. T. Beck, in the following terms:— "That whereas this meeting is of opinion that the Benchers of the Law Society of Upper Canada should be chosen from the Bar without regard to seniority or juniority of rank, and whereas it is impossible for the electors at large to determine what members of the Junior Bar would be suitable candidates for the position, inasmuch as juniors do not enjoy the general reputation which length of practice confers: Be it resolved, that this meeting should nominate a certain number of members of the Junior Bar of Toronto, and should take steps to request the local Bars of the province to make similar nominations."

Mr. Worrell sustained his resolution by arguments, the principle of which it was impossible to meet, and referred

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to the following subjects as proper for the attention of the Benchers, who had, so far as he, and the Bar generally, knew, neglected them, viz :—The establishment of a Law School to take the place of the old Law School which had been abolished, when the duty of the Benchers was to have remedied its imperfections by amendment; the proposing to and pressing upon the Ontario Government of some measure to protect the public against the inroads of uneducated and unprofessional conveyancers; the immediate appropriation of the large accumulation of funds to some present beneficial purpose, instead of allowing them to lie idle and grow larger, only to be used in future by succeeding members of the Law Society who had not contributed to them; a more liberal and beneficial arrangement of the rules regarding the library of Osgoode Hall, the existing rules being founded upon reasons which had their origin some fourteen years ago; the proposing to and pressing upon the Ontario Government, of the advisability of excluding laymen from practising in, and pleading before Division Courts. After a short discussion, this was followed by an amendment moved by Mr. J. H. Macdonald, seconded by Mr. Black :—"That in the opinion of this meeting, the Benchers should be elected without reference to the date of their call to the Bar, and having regard only to their qualifications for performing the duties of the office."

A rather long debate ensued, in which the principle of the amendment was admitted by all parties, though the backers of the amendment confined their arguments to endeavouring to show that junior members should not be elected. The amendment was subsequently carried.

While we shall endeavour to express fairly and openly, what the abstract merits of the case are, we pause here merely to remark that, by the amendment itself, the principle of the Junior Bar has been indisputably carried, though by a strange perversion of reasoning, the supporters of the amendment deny its applicability to the Junior Bar. Before the choice of Benchers was thrown open to election,

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none but leaders of the Bar were appointed. Lawyers being proverbially conservative, upon the first election many, if not all of the then Benchers were replaced. Since the electors depend upon their own knowledge (to a great extent) of the eminent men in the profession, they fix upon those in extensive practice or enjoying eminence in their own localities, and the result is likely to be the same at each election.

The Junior Bar being very numerous, is also very strong, and feels the unjustice of the constant return of men who look upon their election as an honour only, rarely attend convocation, do little or no work, and in some cases forfeit their seats through non-attendance—and this, while certain questions affecting the Profession receive no attention. They also assert that it is contrary to principle that the Benchers should be chosen from the Senior Bar alone; and that if young men of honourable name and fair standing, (though not in such extensive practice as to be widely known) aspire to the honour and are willing and able to work, there is no valid reason why they should not come forward and claim the suffrages of their brethren.

The arguments adduced against this are, as well as we can glean them from the wordy debate:—That there should be no distinction drawn between Seniors and Juniors, and therefore the Juniors should not seek election as Juniors. That such reforms as were suggested by the mover of the resolution did not fall within the trust reposed in the Benchers. That at any rate, they had performed their trust by entertaining a proposal to bring the question of unprofessional conveyancing before the Legislature. That it was not the duty of the Benchers to move in such matters till complaints were made to them. That untried men should not be allowed to transact the business of the Law Society.

We think that no one will dispute the broad fact, that every member of the Bar who has paid his fees, is entitled to election if he can get a sufficient number of votes. This being so, those who oppose the election of junior members

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on the ground that there should be no distinction drawn between Seniors and Juniors belie the principle which is contained in the above amendment which is only an assertion of the principle upon which the Act proceeds in throwing the Bench open to the whole Bar and the principle which the Juniors are striving to assert. In support of the amendment it was said, "Who are the Juniors?" Define the term "Junior." The answer is plain. If the opposers of the movement, standing upon the principle of their amendment, dub Junior Barristers "untried men" and therefore claim the right to reject them as "untried men," they draw a line by their own choice of seniors, and so define "Seniors," leaving the remnant "Juniors." If they deny that Juniors as so defined should share in their suffrages. they deny the principle of their amendment, and assert tacitly a contrary one. They make the point that Juniors, *as Juniors*, should not be represented in convocation, for the specious reason that Seniors should be elected *because they are Seniors*.

The movement is one that is at least intelligible—nay further—intelligent. The promoters have distinctly affirmed that some Juniors at least should be elected. This has been opposed, because it is said to be a class movement, and, on a certain well known principle, it is met by what plainly is a class movement. But the reasoning of the Juniors is more fairly stated thus:—"A certain state of facts has heretofore existed—the Benchers having been chosen exclusively from the Seniors. We consider this an evil, and contrary to the spirit of the Act. We seek to apply a remedy by *extending* the choice to Juniors, and so carrying out the spirit of the Constitution." In reply, it is said:—"You are striving to set Senior against Junior, and divide the Bar." Their answer again is:—"The Benchers are exclusively Seniors now, and the line is already drawn. Our object is to remove this line of demarcation, and, rather than separate Seniors and Juniors by declaring the former eligible and the latter not, we desire to make the choice indiscriminate, regard being had to business qualifications, integrity and honour, only.

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While youth should not be represented *as youth*, still youth ought not to be debarred from entrance on account of youth."

The denial that reforms should proceed from a learned body, supposed to lead in matters professional, will receive its due weight with the profession. Whether they should or should not, the profession is at present demanding of the Benchers, as their head and front, to place these reforms before the Legislature; and if the profession consider this a duty, and act upon it, it makes but little difference to them whether as an abstract principle such reforms should so emanate.

For our part, we think no one will dispute the assertion that any reform touching the administration of law should proceed from a learned and enlightened body like the Law Society.

It is a notorious fact that the business of the Law Society is transacted by a very small proportion of the Benchers. It is also a notorious fact that the time of these painstaking gentlemen—all in large practice—is very much burdened with this work—a great deal of it routine work. It is notorious that the seats of some of the Benchers are barely saved by their meagre attendance. It is notorious that lately several Benchers have forfeited their seats by non-attendance. No doubt, unless this or some other intelligent movement progresses, these eminent men will be re-elected—solely on account of their eminence—to go through the same process. We give all honour to those who do the work; but simple justice requires that those who do not work, and who forfeit their seats by non-attendance, should give place to those who are willing to work. A great deal of the routine work might be done by young men, and in convocation they would naturally and properly defer to the opinions of older men. It is absurd to say that a barrister of from five to fifteen years' standing is so "untried" as not to be capable of assisting in the business of the Law Society; the best evidence of the utility, practicability and deserts of the movement rests in the fact that it is approved of by many senior members of the Bar and Benchers who would be glad if their constant attendance on committees were lightened.

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EDITORIAL REVIEW.

Hotchpot Statutes.

We learn from the *Central Law Journal* that the constitution of Missouri requires that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an Act be not so expressed in the title, such Act shall be void only as to so much thereof as is not so expressed." Other States of the Union have similar wholesome provisions.

Our own legislators would do well to make this rule their practice, even if they did not care to embody in it the Constitution. We might point to numbers of the Acts of the Ontario Legislature before Revision, which are fairly entitled to the above appellation, the titles to which are either so general or so vague, as not to be indicative of anything contained in them, or so limited as to be misleading. This evil was to a great extent remedied by the Revision and consequent arrangement of the Statutes; and that period would have furnished a good opportunity for making a change in this respect.

We regret, however, to observe that the same practice still obtains. Chapter 8 of 41 Vict. sec. 1, under the title "An Act to make certain amendments in the Revised Statutes," provides for the re-arrangement of the Townships of Hagarty, Sherwood, Jones, Richards and Burns in the Judicial District of Nipissing. These illustrious names, no doubt, suggested to the draftsman the eminent Judges after whom the Townships were called, and the Judicial District of Osgoode Hall; for he displays his humour by providing in the second section for the arrangement of the sittings in the Court of Appeal. The 4th section refers to the equalization of business in the Superior Courts; while, sandwiched in between the 2nd and 4th sections, is an enactment debarring Senators and Members of Parliament from holding salaried offices under the Ontario Government. The Division Courts, the

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reception of evidence on motions in the Superior Courts, the use of stenography in taking depositions, penalties for non-compliance with orders for examination etc., the protection of Justices of the Peace, the administration of justice near Niagara Falls, Chattel Mortgages, Dower, Life Insurance, Anatomy, Joint Stock Companies, Mutual Fire Insurance Companies, Benevolent and other Societies, Municipal Elections, School Rates, Public School Teachers and Public Schools share in the patronage of this chapter; and the versatile but impulsive legislator appends to a list of subjects more various than the contents of a pedlar's wallet, as his twenty-third and last section, an amendment to an Act respecting the suggestive subject of the custody of insane persons.

We shall refer to but one more instance of "Hotchpot Statutes," viz:—Chapter 14 of 43 Vict., which consists of four sections. Section one abolishes right by prescription to access and use of light; Section 2 defines the meaning of "heirs" in a devise; and Sections 3 and 4 relate to Dower.

An instance of a title which is absolutely misleading is to be found in chapter 15 of 42 Vict. The Act is entitled "an Act to make certain provisions respecting the practice of the Courts." Section 4 limits the time for Sheriff's sales in Algoma to certain months in the year; and Section 8 amends the Local Courts Act, touching the priority as between themselves of the Judges and junior Judges of the County Courts— neither of which subjects can be said to come properly within the title.

Amalgamation of French and English Systems of Legal Procedure.

Under this caption M. M. in the *Legal News* 5th March, 1881, refers to "the growing sense of *desideratum* of something of the kind" in Quebec; but laments that from "causes incidental to her position as one of isolation in the matter of internal law, viz., civil law and legal procedure, and from the rather pronounced * * contempt of Quebec law, its Judges, Bar, and every branch of its administration,

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the initiative in that direction has yet to be taken." We cannot agree with the writer that contempt is generally, or even frequently, expressed for the French law, though we are apt to think that the system of administering law in Quebec is not so strong and concentrated a system as that under which we flourish in Ontario. Expressions of contempt of the French law are deserving of contempt in their turn.

We could point to cases in which reference has been had by our Courts to the Civil Code, for the elucidation of principles of our own law by comparison and contrast with rules to be found in the Code. We have borrowed from the Civil Law before, and might do so again with advantage.

We fancy the greatest technical obstacle in the way of effecting such a result as amalgamation is the want of codification in our law—a matter in which Quebec has decidedly the advantage of us. We are, however, no doubt, tending towards a Code which is a step necessary to be taken before amalgamation can be brought about.

The British North America Act gives power to the Parliament of Canada to make provision for the uniformity of all, or any of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, with the consent of the Provincial Legislatures.

What might be called a physical obstacle, and perhaps the greatest of all is the obtaining the consent of the Provincial Legislatures. To assimilate and make uniform the laws of Canada would be useless, unless the power of amendment were vested solely in the Parliament of Canada, with a view to the maintenace of uniformity. To achieve this result the Provincial Legislatures must resign their powers and functions into the hands of the Federal Government.

In fact the result would be a legislative union, the chief obstacle to which has heretofore been, we have always understood, the want of similarity of the Quebec law to that

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of the other Provinces. The feeling, if it largely exists as expressed by the writer is evidently one engendered by necessity, and is therefore sure to develop; and may be said to be in view of our past history, one of the indications that a legislative union of the Provinces (even now not only hoped for, but actually anticipated by some of our leading men) may yet become a fact.

Supreme Court Procedure in British Columbia.

We are indebted to a member of the Bar of British Columbia for papers referring to the changes in the practice of the Supreme Court of British Columbia. The new rules have been compiled by the Hon. Geo. A. Walkem, Attorney-General, and seem to give general satisfaction. Though said to be on the way to us we have not yet received a copy, but will notice them upon receipt.

The *Victoria Daily Standard* says:—"Hitherto the procedure has been that of England, so far as applicable to British Columbia; which practically meant that there was no ascertained course of procedure. The inconvenience of such a state of things has been severely felt by the legal profession for years past. The American lawyers who from time to time visit our courts usually comment upon the obvious uncertainty of both law and practice in the Province."

On the completion of the task, a large meeting of the Incorporated Law Society was held, at which the following resolution was passed:—

Resolved, That the Incorporated Law Society of British Columbia desire to express their thanks to the Hon. Mr. Walkem for the very able and satisfactory manner in which he has accomplished the difficult undertaking of compiling a new code of Supreme Court Procedure, and their appreciation of the immense amount of labor which, in spite of the grave and arduous duties of the Attorney-General, has been bestowed upon the Code—a work which will form the basis of all future civil practice in the Province."

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The Desideratum of Law Schools.

We called attention in our February number to this subject, and pointed out that the want of some educational agent for students was felt when the late Law School was founded. We also asserted what we believe to be a fact, viz: that the usefulness of the School was not denied when it was abolished. Both of these propositions have received corroborative proof by the formation of a Society at Hamilton similar to the Osgoode Literary and Legal Society. And this fact again supports us in alleging the efficacy of the scheme, which we proposed in discussing the subject, whereby the chief centres outside of Toronto should all have their Law Schools or branches of a Law School ministered to by local members of the Bar. The students are at present without guides; for it is most truly said by R. V. R. in a short article entitled "Many Law Schools," in *The Canada Educational Monthly* for March 1880, "Every one who knows anything of the subject is aware that the active practitioner engrossed with the cares of business cannot, or at least does not, furnish the students who place themselves in his charge and bind themselves to do so much for him, the attention and assistance essential to give a correct direction to their reading, and to teach them how to apply it usefully and aptly in their subsequent professional life." The standard is being raised higher and higher by frequent changes in the Law Society curriculum, and yet no means of educating the students is provided. Happily this fostering neglect has the effect of a fertilizer; though that does not absolve the Law Society from what we conceive to be a plain failure of one of its most important duties. The necessity of tuition shows itself in the formation of the Hamilton Society. We learn that at the meeting at which the proposal was discussed or suggested a lecture was delivered by Mr. F. Beverley Robertson, Mr. Mackelcan, Q.C. being in the chair, on the subject, "What is a legal right?" which was well received. This will, no doubt, be followed by action similar to that of the Osgoode Literary and Legal Society, in their endeavour to provide for themselves a

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regular course of lectures. We shall, no doubt, soon hear of other such societies in other cities. The feasibility of our scheme already referred to will thus have been demonstrated; and action having commenced it will remain only for the Law Society to offer its aid by way of subsidizing a regularly appointed staff of Lecturers. In the meantime, we congratulate the Hamilton Bar and students upon their energy, and wish success to their undertaking.

The Chief Justice of Manitoba.

It is always to be regretted when complaints are expressed of the judiciary. One of the greatest boasts of Canadians is the spotless honour and integrity of their Judges. It is therefore with infinite regret that we learn of the actual presentation of a petition to Parliament, complaining of the Chief Justice of Manitoba. It is still more to be regretted that the lateness of the Session will prevent the immediate investigation and disposition of the charges brought against His Lordship. In the meantime certain party newspapers would show no more than a moderate amount of wisdom, did they refrain from entering upon His Lordship's defence before the accusation is fairly laid. No one doubts for a moment that a fair trial will be accorded in both Houses of Parliament, and those journals which begin to excuse, almost before the complainants have had time to accuse, will prove very questionable friends to the Chief Justice, and very doubtful votaries of the Blind Goddess. We cannot refrain from expressing a hope that the charges rest upon misconception.

The Chief Justiceship of Ontario.

The appointment which is understood to be made, though not officially announced, of the Honourable John Godfrey Spragge (until this appointment, Chancellor of Ontario) to the Chief Justiceship of Ontario, rendered vacant by the death of the late lamented Chief Justice Moss, will be received by the profession with unfeigned satisfaction. His

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Lordship is eminently fitted for the highest judicial appointment in the Province; and his presence in the Court of Appeal, from his experience and reputation as a sound lawyer, will lend great weight to the decisions of this important tribunal, and will serve to keep unimpaired the confidence which the profession have learned to place in its judgments. We offer our congratulations to His Lordship, and hope that he may long live to adorn the Bench.

Annotations to the Judicature Act.

We understand that two works on the Judicature Act are now in press. The names and reputations of Messrs. Maclennan, Q.C., Taylor, Q.C., and Ewart, are a sufficient guarantee of the value that these works will be to the profession. As the new law comes rather precipitately upon us, we hope that the annotations will be speedily pushed through the press.

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NOTES OF RECENT DECISIONS.

The Agricultural S. & I. Society v. *The Federal Bank*, 1 C. L. T., Occ. N., 196. This important case will no doubt be productive of one of two things, viz., an enactment protecting bankers against the consequences of cashing a customer's cheque payable to order when the indorsement is forged, or their refusal to pay such cheques at all. Mr. Justice Burton in giving judgment said that banks are not bound to pay their customers' cheques if drawn payable to order; but if they undertake the responsibility of paying them, they must look to it that they pay the proper person. We believe the law of Ontario, as to payment of cheques with forged endorsements has never been disputed, though we cannot ascertain that this express point has ever been decided here before.

The nearest approach to it is *Gissing* v. *Hopper*, 6. O. S. 505, where a letter of credit with a forged indorsement was presented to the Bank of B. N. A. and paid. The representative of the payee, who had meanwhile died, recovered the money from the bank as money had and received to the payee's use.

The Queen v. *Hoodless*, 1 C. L. T. Occ. N. p. 176.—This case is a warning to magistrates of the care to be observed by them in taking bail for persons charged with indictable offences. One Stewart, an officer in the Inland Revenue Department of the Government, at Hamilton, was charged before the police magistrate of that city, with a violation of one of the provisions of the Inland Revenue Act. On the matter coming before the magistrate for investigation, counsel for the accused asked for a postponement of the examination, and offered to give bail for the further appearance of his client. The magistrate consented to take bail and release Stewart. In drawing up the recognizance of bail, 32 & 33 Vict., cap. 30, sec. 44, (D.) Schedule (Q. 2),

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the words "to owe" were omitted. The accused absconded to the United States, and the Attorney-General for Ontario brought an action on the recognizance against the bail. It was held, that a stricter construction must be placed on a recognizance of bail in a criminal case than on an ordinary contract between subject and subject, and that the omission of the two words referred to made the recognizance invalid. The whole difficulty arose from using a printed form, the magistrate taking for granted that it was correct. These forms as a general rule are not properly corrected when going through the press, and bear no authority or guarantee of correctness, save that of the printing office which issues them. Similar difficulties arise in the use of printed deeds, mortgages and leases, and litigation is thereby engendered. Too much care cannot be taken by magistrates in closely following the forms which the Legislature has prescribed, not only with regard to indictable offences, but to cases of summary conviction. Indeed, a careful magistrate, or in fact any person having occasion to use a statutory form, should never promulgate any such document without consulting the words of the Statutes.

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BOOK REVIEWS.

A Digest of the reported cases determined in the Courts of Common Law and Equity in the now Province of Ontario, from Trinity Term, 1823, with some decisions from County Courts, and references to Statutes. By CHRISTOPHER ROBINSON, Esq., one of Her Majesty's Counsel, and F. J. JOSEPH, Esq., of Osgoode Hall, Barrister-at-Law. 2 vols. Toronto: Rowsell & Hutchison, 1881.

This work, the completion of which all have long anxiously awaited, is now in the hands of the profession. The vast accumulation of cases inevitably attendant on the administration of justice, the frequent reference to, and the acquired authority of past decisions, have long rendered a collection of the various questions determined in our Courts, not only highly desirable but imperatively necessary to the practitioner. The want of a Provincial digest has been felt the more, since the divergence of our jurisprudence from that of England consequent on a somewhat different legislative policy, and the peculiar requirements of a young and growing country, have rendered the English decisions on many points less applicable than heretofore. With regard to real property, the law of descent has been revolutionized; the Registry Acts, besides simplifying the verification of titles, have greatly modified the doctrines of notice, of equitable liens, and of the consolidation of securities; sale under execution depends on peculiar circumstances in our history; and the law as to fraudulent preferences, both of real and personal property, has been pushed beyond that in force on the Mother Country. The law relating to Married Women differs from that of England. Insurance and Railway Laws depend upon Local Statutes; and our School System and Municipal Institutions are peculiar to this continent. On these and many other matters the English decisions throw little or no light, and we must have recourse to the judgments of

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our own Courts for guidance. In this, the work before us is an invaluable assistance. The decisions on several of the subjects treated are very numerous and often conflicting, and the difficulties in arranging them must have been great, but these difficulties have, in a large measure, been overcome. The cases have been collected under their various heads with all the precision possible; and where the same decision properly arranges itself under different subjects, the cross references are a safe thread to lead us through the labyrinth of law.

A great deal of labour has been expended on the subject of practice, and we regret that this labour has, to a large extent, been in vain. The passage during the last session of the Ontario Legislature of the Judicature Act, leaves to many of the past decisions, on questions of procedure, a comparative value, only. Still, ideas once rooted are wonderfully persistent, and it is certain that the changes introduced by the above Statute will receive a complexion coloured by the existing practice, and will hence prove less radical than at first might be anticipated. But this is a subject of which we will treat more at large hereafter.

A glance over the well arranged subjects suggests to us that this and future efforts of the compilers may be more than an aid—may be possibly the first step toward codifying our law. The accumulation of reports demands that there should be workers for the profession, reducing the vast body into regularity, and placing at our elbows the results of well digested cases. The tendency is to reduce the extent over which our law is spread, to a still narrower compass, bringing it within the more immediate and convenient range of the mind's eye. A digest makes our law more manageable—a code would make it still more so.

As to the plan of the book, the compilers have adopted the excellent arrangement followed in Fisher's Digest. In collecting the decisions they have not trusted altogether

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to the head notes in the reports, but have verified them by a careful perusal of the text of the cases themselves. Many County Court decisions are noted among the number.

On the whole, we may congratulate the profession on its new acquisition. To those residing outside of Toronto, and to whom the absence of a complete Law Library renders the science of doubt doubly dark, the benefit will be specially great. Finally, we may say without exaggeration, that we owe a debt of gratitude to Messrs. Robinson & Joseph for the arduous and uninteresting task they have undertaken and performed, the more so, since, owing to the limited field in this Province for legal writers, their work supplies the place of many text books.

It is, we believe, the intention of the compilers to issue a supplement every two or three years, as occasion may require.

Law relating to Stocks, Bonds, and other Securities in the United States. By FRANCIS A. LEWIS, Jr., of the Philadelphia Bar. Philadelphia: Rees, Welsh & Co., 1881.

This volume is an entire novelty. Opening with a short historical sketch of the beginning of speculation in stocks, the learned author proceeds to describe shortly the working of the English Stock Exchange, the method of dealing in stocks on this Continent, and to define the technical terms used by brokers. Bull, Bear, Lame Duck, Option, Put, Call, Straddle, Flat, Long, Short, Shave, and Spread-Eagle, (the last term bearing strong evidence of its nationality) are defined. With such an introduction we are prepared for the more solid chapters, which form a concise and valuable treatise on this comprehensive subject. The effect of Exchange usages on Stock Contracts, is exemplified by several cases, the result of which is thus summed up:—1. That the usages of the Stock Exchange

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bind the members of that body, and those who contract through members, provided such usages contravene no settled law or public policy. 2. That the principal cannot by private instructions to his broker modify his own liability. 3. That while the principal is bound by his broker's contract he is not liable for all the consequences of his insolvency.

Blank powers, negotiability of stock certificates, Statute of frauds, wagering contracts, pledges, specific performance, and measure of damages are treated of in separate chapters, the whole forming a compact and valuable volume. The learned author has not confined himself simply to compiling a digest, but has written a treatise on his subject sustaining his views with authority.

We cannot lay aside the book without paying some tribute to the publishers for its beautiful typography.

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OSGOODE LITERARY AND LEGAL SOCIETY.

At the regular meeting of the Society, held on the evening of Saturday, the 26th February, the President in the Chair, Mr. Isaac Campbell continued his series of lectures on "Constitutional History." At the conclusion of the lecture a vote of thanks was unanimously passed and tendered him for his very able and instructive course of lectures.

Judging from the number of members present, the meetings of this Society are gaining in popularity among the law-students, affording them as they do the only means of acquiring legal knowledge by the much appreciated method of lectures.

Mr. Masten, a new member, was introduced to the Society by Mr. Munson.

An elocutionary contest then took place, each member being allowed to choose his own subject for reading or recitation. Fifteen members took part in the competition. The jury which had been empanelled to decide upon the merits, awarded to Mr. Brooks the first prize for his recitation, entitled, "The Address of Spartacus to the Gladiators," and the second prize to Mr. Cox for his reading, entitled, "Modern Houses." The prizes were $10 and $5 respectively. The meeting then adjourned.

At the regular meeting on the evening of the 12th March, the President in the Chair, Mr. J. Percy Lawless was introduced to the members of the Society, and signed the membership roll.

Under the head of general business it was unanimously resolved that Messieurs Hodgins, McDougall, Delamere, Ewart, Biggar, Armour, Thomson and Campbell, the gentlemen who had so kindly volunteered as lecturers to the Society during the session, should be sent complimentary invitations to attend the annual dinner. It was also re-

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solved that the gentlemen who had presided, or were to preside, at the public debates of the Society during this session should also be invited, and further, that the editors of the *Canada Law Journal* and *The Canadian Law Times*, the columns of whose journals had always been so freely open to the students, Mr. Nicholas Flood Davin, and several other gentlemen should be invited to be present. The propriety of the use of wine at the dinner was discussed, and a motion to have wine on the table was carried. The meeting then adjourned.

The 14th public meeting of the Society was held in the Court room of the Common Pleas, at Osgoode Hall, on the evening of the 17th instant, and was the most successful meeting the Society has had. One half of the crowded room was filled by the fair sex, attracted thither, no doubt, by the interesting subject of debate. The chair was filled by Dr. McMichael, Q. C. A recitation by Mr. Brooks, entitled "The address of Spartacus to the Gladiators," was given by request of the Society. His efforts were fully appreciated by the audience. Then followed the reading of the address of Sergeant Buzfuz to the jury in the trial scene of *Bardell* v. *Pickwick*," by Mr. W. J. Nelson. The young gentleman was attired in the costume of Sergeant-at-Law, having donned wig as well as gown. His rendition was highly creditable. The audience were much amused and on assuming his seat, he was greeted with well deserved applause.

The debate was on the passage clipped from Tennyson's "In Memoriam," "'Tis better to have loved and lost, than never to have loved at all." Mr. A. B. Cox opened the discussion, on the affirmative. His speech was ably delivered and showed study. The audience seemed to pay close attention to his arguments, and on the conclusion of his remarks he was warmly applauded. Mr. J. B. Hands, followed as leader of the negative. His speech was rendered amusing by the intermingling of a few relevant and appropriate anecdotes. Mr. J. Scott followed, in support of the affirmative. Mr. J. W. Curry then spoke in

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favour of the negative, and commented briefly on the remarks of his opponents. Mr. Cox replied, and exposed the argument of the negative to an amusing criticism.

The learned Chairman, after briefly reviewing the arguments advanced, pro and con, gave the audience the benefit of a very able and amusing speech, setting out his own views upon the resolution, illustrating his remarks by amusing tales and passages from various poets, and finally decided in favour of the affirmative.

A vote of thanks was then unanimously passed by the Society and tendered by the President to the learned Chairman, who made a neat speech in reply, congratulating the students on their endeavours to educate themselves in the art of speaking, relating his own difficulties when first called to the bar, and expressing himself highly pleased and instructed by the evening's entertainment.

The meeting then adjourned.

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REVIEW OF EXCHANGES.

American Law Review—March, 1881.

Trustees as Tort-Feasors, by ARTHUR G. SEDGWICK. This is a second instalment of an exhaustive review of the authorities on the subject. The confusion of the law is thus summarized by the learned writer:—1. It is said that trustees are bound to show, in the discharge of their duties, that amount of care which a prudent man would use in his own concerns. 2. It is said that even care will not excuse him, if the fund is diverted from the proper channel. 3. It is said that an unpaid trustee is bound to apply to a discharge of his duties a less degree of care than a paid trustee, but at the same time that he is responsible for ordinary care. 4. With regard to the responsibility of one trustee for the acts of another, it is said to be the general rule that he is not responsible, 5. He is responsible for acts of his co-trustees, if he connives at them. 6. He is responsible for their acts when *ultra vires*, if he takes no action after discovering the the breach. 7. If the act complained of is *intra vires*, but is a breach of trust, from its being an act of negligence, he is not responsible for inaction. 8. He is responsible for all the acts of his co-trustees, unless he can show that at every instant of time during the continuance of the trust, he kept actual watch upon them, and in case of a breach took some steps to redress it. 9. He may exonerate himself by showing that he honestly mistook his powers under the trust. 10. He may excuse himself by showing that there was a doubt as to the proper construction of the trust, that he took the advice of Counsel and acted upon it. 11. It is held that neither of these things will exonerate him. 12. It is held that in the case of any ordinary inattention, or negligence, or neglect of duty, on the part of a trustee, the *cestui que trust's* remedy is wholly equitable, that he must seek relief by the usual means, making all the trustees parties defendants, so that there may be contribution among them in the same suit, and a determination of the controversy. 13. It is held that the remedy is either equitable or legal at the option of the plaintiff, who may recover against one, or some, or all the wrong-doers, in a legal action for negligence, all the damages caused by the breach, leaving them to maintain their action for contribution afterwards, if they have any. 14. It is held that this can be done in cases of fraudulent cases of breaches of trust. 15, That it extends to all cases of negligence. 16. That it does not extend to that particular case of negligence which arises through the inaction of a trustee after discovering a breach of trust committed by his co-trustee. 17. In the case of corporate trusts managed, not by the whole body of trustees, but by committees, a trustee is not liable at all for a breach of trust which has been committed by the managing committee, provided that the matter was properly referred to the committee, and the trustee merely acted upon their decision, and, without independent inquiry into the matter, sanctioned the breach of trust on the strength of their report that the act was justified by the circumstances of the case.

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Discrimination in Fares by Carriers, by WARD MCALLISTER JR., discusses principally the relative rights of railway corporations and travellers, where the latter has bought a ticket for some point on the line beyond his destination, which he obtains at a price less than the fare to his intended destination, on account of competing lines running to the farther place.

American Law Register—February, 1881.

Contempt of Court, by CHARLES CHAUNCEY, is the first instalment of an exhaustive article on this subject viewed from every standpoint, citing English and American authorities.

Central Law Journal—11th February, 1881.

The Constitutionality of Local Option Laws, by HENRY WADE RODGERS, points out that, upon the authorities cited, those statutes which involve a delegation to the people of the power to make them law are unconstitutional. The Supreme Court of Iowa has decided that the Legislature cannot refer to the people the question whether a particular act shall become law. As a natural result these decisions only produce statutes which avoid this objection, while they arrive at the same practical result. The law is passed. "The popular will is expressed under and by virtue of a law that is in force and effect, and the people neither make nor repeal it. They only determine whether a certain thing shall be done under the law, and not whether said law shall take effect. The law had full and absolute vitality when it passed from the hands of the Legislature." A case is eited illustrating the above distinction in which it was held a constitutional act which declared that if a majority of the duly qualified voters declared against issuing licenses for a township, it should not thereafter be lawful to grant licenses until a contrary vote had been cast. The more advanced view is said to be that, as the Legislature can empower municipal corporations to regulate the traffic in intoxicating liquors, there is no reason why the same trust should not be delegated to the people themselves. And so the Supreme Judicial Court of Massachusetts has decided that, "It is equally within, the power of the Legislature to authorize a town by vote of the inhabitants or a city by a vote of the city council, to determine whether the sale of particular kinds of liquors within its limits shall be permitted or prohibited." This is the view adopted in the Minnesota courts, and the one which commends itself to the learned writer.

The Nature and Effect of a Quit Claim Deed, by W. D. MARTINDALE. "The character and effect," says the learned writer, "given to a deed of release and quit claim in this country are peculiarly American."

Ibid—18th February, 1881.

The Liability of Banks in making Collections for the Acts of Correspondents and Notaries, by C. G. TIEDEMAN. The subject is divided into two heads. 1. Its liability of the bank in cases of collections for the acts of its corresponding bank. 2. The liability for the acts

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of the notary employed to make the demand and protest for non-payment. The conflicting decisions of New York and Missouri are reviewed, the courts of the former State holding that the receiving bank is liable, while the latter courts hold that the collecting bank is liable. The point came before the Supreme Court of the United States, where it was made a question of fact as to what was the contract with the bank, whereas the State Courts before mentioned had decided the question in different ways as conclusions of law. The truth seems to be summed up in the learned writer's words:—"It may, therefore, be considered as determined that if the receiving bank by its contract with the owner had agreed to collect the note or bill, it is liable for all damages resulting from the acts of its agents whoever they might be; on the other hand, if the contract only obliges the receiving bank to transmit to a suitable agent for collection, then its liability is at an end, if it has exercised proper care in the selection of the agent. The question then resolves itself into one of fact: "What did the receiving bank agree to do?" It is shown, however, that an action will lie for misfeasance against the collecting bank by the owner where the contract with the receiving bank was for collection.

"The liability of the bank for the acts ot its notary rests upon the question: "Is a notary a public officer?" The protest is required only in the case of foreign bills, and the notary's duty is to make demand, and upon refusal, to protest. The giving of notices not being an official duty, the bank, though not liable for the act of a public officer, done in the discharge of his duty, will still be liable when it employs him to do something which may be done by any one else. The writer applies the same reasoning to to inland bills which do not require protest.

Ibid—25th February, 1881.

Negligence as affected by Custom, by JOHN D. LAWSON, continued in the number of the 11th March. A Review of English and American authorities as to the admission of evidence for the purpose of ascertaining whether or not a person has been guilty of negligence by comparing the general usage of a particular country place or trade with the action of the defendant in the particular case in point. In many of the American cases cited and commented upon, an ingenious attempt to set up a custom as an answer to negligence has signally failed. We take one illustrative instance. A railway employee, in the yard of his employers, was injured by a detached car, which was shunted along the track on which he was working. A brakesman on the car swore to having called out to the plaintiff, who did not hear him. The company at the trial offered evidence of a custom, known to the plaintiff, that in switching cars in the yard it was not their duty to have a brakesman on the cars in motion, but that a car might be sent along the track as the exigencies of the business required it without any one to give warning. The Supreme Court of Wisconsin, said:—"On grounds of public policy, a custom which would permit the brakesman to let the car run upon the trackmen, when he knew of their peril, and could easily avoid it, can hardly be sustained as a valid custom." It is also more succinctly put in another case, "That a custom not

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to observe the law could not be shown." The learned writer in enunciating the results of the decisions, says, that the rule is laid down "that a custom to affect the general law of negligence must, in the first place, be ancient; secondly, must be reasonable; and thirdly, must not conflict with the Statutory law." It readily appears that a custom (however ancient it may be) to cause damages by negligence cannot be said to be reasonable. Other cases are cited in which it is not quite plain that they are governed by custom, viz., where employees are met by the employers showing a custom to do something in their business, of which the employees had knowledge whereby the employees, in the course of his employment, were injured. These would seem to come more properly under either of the principles that a servant assumes the risk of the service in which he engages and remains, or that he knowingly hazarded his safety and contributed to his own injury.

Liability of Street Railroads to Passengers, by W. H. WHITTAKER, is a collection of cases of negligence, occurring in connection with Street Railways.

Ibid—11th March, 1881.

A Phase of the burden of Proof in Action on Promissory Notes, payable to Bearer, by STEPHEN H. TING, shows that it is important in such actions to ascertain whether the plaintiff is the original bearer of the note or not. In case he is, defences may be entered into which could not be set up if the plaintift were a subsequent transferee without notice of a defect.

Criminal Law Magazine—March, 1881.

Calligraphy and the Whittaker Case. This article contains some interesting reading on this very uncertain science.

Law Magazine and Review—February, 1881.

Crown Prosecutions, Right of Reply, by JOHN KINGHORN. A history of criminal prosecutions, theoretically and practically. An examination of the origin of the right of the Attorney-General to reply, and of some of the cases bearing upon the right.

The Statute of Uses and the present system of Conveyancing. Ought the Statute to be Repealed. By W. H. UPJOHN. After showing the origin of equitable ownership and its growth, the learned writer sums up its history thus:—"It is a movement from *mos* to *jus*, and from *jus in personam* to *jus in rem*." The Statutes relating to Uses are then reviewed, and the principles and rules governing the use. It is concluded that "the effect" of the Statute upon the present system of conveyancing may be said to consist in this, that it renders valid executory limitations, not by way of remainders of legal estates of freehold, such limitations being void at the common law in an instrument operating *inter vivos*."

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The Abolition of canvassing at Parliamentary Elections with a Draft Bill, by GEO. G. GRAY. It is proposed to make canvassing a "corrupt practice" and punishable.

"Extra-Territorial" Oaths, by SHERSTON BAKER. A case is cited in which a will was proved in Germany, but it was necessary that probate should also be obtained in England to realize a trust fund. An affirmation was made before the British Vice-Consul at Breslau, but there was nothing to show that the affirmant had a conscientious objection to the taking of an oath. Sir James Hannen rejected the application for Probate for want of proof, there being no oath or proper affirmation. It appeared that the taking of a voluntary oath is unlawful in Germany. The learned writer continues:—"The law of England, by the above Statute (18 & 19 Vict., cap. 42, amending 6 Geo. IV., cap. 87), endeavours to create a jurisdiction for its officers within foreign states, and to punish infractions of such jurisdiction; it further enacts by another Statute (C. P. L. Act, 1854) that evidence submitted to its courts, including that of foreigners taken within their national jurisdiction, shall be supported by an oath. On the other hand, foreign states do not of necessity yield that jurisdiction to British officials, within their own limits. Infractions of such jurisdiction are not crimes by the *lex loci*, nor do foreign states of necessity permit their subjects, while within the national territory, to make oaths for purposes required by English Courts." A treaty is suggested which would make false swearing perjury, and punishable by the territorial courts, as an offence against the *lex loci*. It is also suggested that perjury so created should be made extraditable.

Southern Law Review—February—March, 1881.

The power of Usage and Custom to Control and Alter Rules of Law, by JOHN D. LAWSON. This is the first of several promised papers on an interesting and broad subject. The burden of the article is found in the following passages:—"The purpose of this and succeeding papers is to show that custom or usage does affect established legal doctrines; that it frequently controls them; that it sometimes alters them entirely." Again, "If usage and custom have altered a law of yesterday, usage and custom may equally well alter a law of to-day." This involves the startling proposition that a usage or custom to infringe the law may become valid by persistence in observing it, and may in turn become the law. "Example: In 1775, it is a rule of law that factors may not sell on credit In 1800, it has become the custom for factors to sell on credit. In 1875, it is a rule of law that factors may sell on credit." Usage or custom can never gain such ascendancy over rules of law as to excuse, or authorize an act whereby damage accrues to another, as the same learned writer has shown in a cognate article in the *Central Law Journal* reviewed at page 247 of this number. The movement, so concisely depicted above, at first blush appears to show the elasticity of the law itself, in accommodating itself to the changing fashions and modes of dealing, and requirements of a progressive people. But the true principle seems to be that—to use the

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learned writer's example—in 1775, it being the custom for factors not to sell on credit, the law assumes that parties seeking its relief had agreed or dealt with each other *as a fact* according to the custom; that the custom, having in succeeding years changed, parties must *as a fact* be assumed to have contracted according to the then usage or custom. The principle of law is thus retained intact, that where a contract is entered into, and a usage or custom obtains among men of commerce with reference to such a contract, the law will presume the custom to have become an element in the contract. And so in each case the law enforces the contract, as it was in fact made. The subject is considered as follows:—(i) In the case of common carriers. (ii) In the law of insurance. (iii) In the relation of landlord and tenant.

Notice to Corporations, by EDWIN G. MERRIAM, is a valuable article, treating of the means whereby knowledge is brought home to a corporation, through the media of its different officers. Besides the effect of express notice to President, Directors, and other officers, there is discussed the subject of constructive notice of private dealings between officers and persons, the effect of private knowledge of officers in their personal dealings with corporation and constructive notice of frauds of officers. English and American authorities are cited.

Demand and Refusal in Trover, by ORLANDO F. BUMP. The learned writer gives a very numerous collection of cases, English and American, upon the different phases of the subject.

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Law Society of Upper Canada.

HILARY TERM, 44TH VICTORIÆ.

During the Term the following gentlemen were called to the Bar.

The names are arranged in the order in which they entered the Society, and not in the order of merit.

George A. Skinner, John Philpot Curran, Reginald Boultbee, Harris Buchanan, Goodwin Gibson, Wm. James Thornley Dickson, James Alex. Allan, Walter Alexander Wilkes, James Harley, William White, Daniel Erastus Sheppard, Wallace Nesbitt, James B. McKillop, Colin Campbell, Philip Henry Drayton, Thomas C. L. Armstrong, John Doherty, Alex. Dawson, Thomas Dickie Cumberland, J. Gordon Jones.

And the following gentlemen were admitted into the Society as Students-at-Law.

GRADUATE.

Henry Gordon Mackenzie.

MATRICULANTS OF UNIVERSITIES.

James M. Knowlson, Edwin Mowat Henry, Edward Wilson Boyd, Reginald Rudyerd Boulton, William Arthur Campbell, Arthur Lake Rundle, Frederick Laing Fraser.

JUNIOR CLASS.

James F. Williamson, John Thacker, Edmund Walker Head Van Allen, Robert George Code, Wm. Robert Smith, Wm. Nassau Irwin, Edward Herbert Ambrose, George Edgar Martin, John Smith Meek, Archibald McKechnie, Wm. Henry Tweedale, Thomas Francis Johnson, Sidney Chilton Mewburn, George Hutchison Esten, Wm. Lawrence Leslie,

And the following gentlemen passed their examination as Articled Clerks:—

Albert Wesley Benjamin, John Hambly, James Joseph Berry.

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RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATION FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other Candidates for admission as Articled Clerks or Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

ARTICLED CLERKS.

1881.

Ovid, Fasti, B. I., vv. 1-300: or
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

STUDENTS-AT-LAW.

1881.

CLASSICS.

Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.
Cicero in Catilinam, II., III., IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

ENGLISH POEM.

Lady of the Lake, with special reference to Cantos V. and VI.

1882.

CLASSICS.

Xenophon, Anabasis, B. I.
Homer, Iliad, B. VI.
Cæsar, Bellum Britannicum (B. G. B. IV. c. 20-36, B. V., c. 8-23.)
Cicero, Pro Archia.
Virgil, Æneid, B. II., vv. 1-317.
Ovid, Heroides, Epistles V. XIII.

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ENGLISH POEM.

The Deserted Village, | The Task, B. III.

1883.

CLASSICS.

Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Æneid, B. V., vv. 1-361.
Ovid, Heroides, Epistles V. XIII.

ENGLISH POEM.

Marmion, with special reference to Cantos V. and VI.
Paper on Latin Grammar, on which special stress will be laid.
Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid. Bb. [I. II., III.

ENGLISH.

A Paper on English Grammar.
Composition.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive Roman History, from the commencement of the Second Punic War to the Death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose:—

1881—Emile de Bonnechose, Lazare Hoche.

Or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, 7th edition, and Sommerville's Physical Geography.

Articled Clerks will be examined in the same years in the same portions of Ovid or Virgil, as noted above for Students-at-Law, at the option of the candidate.

A Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

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INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination shall be:—

Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery; O'Sullivan's Manual of Government in Canada; the Dominion and Ontario Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, R. S. O., and amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows:—

Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (Chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Torts; Caps. 49, 95, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris' Principles of Law, and Books III. and IV. of Broom's Common Law, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Primary Examination for Students-at-Law and Articled Clerks will begin on the 2nd Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

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DIGEST OF SELECTED CASES

ON

CRIMINAL LAW.

ABDUCTION OF WOMEN AND CHILDREN.

Prisoner's knowledge of age.—To support an indictment for the abduction of an unmarried girl under sixteen years, it is not necessary to prove that the person who abducted her knew her to be under sixteen, as the person who does so is bound to ascertain her age; and if she turns out to be under sixteen, he must take the consequences. *Reg* v. *Mycock*, 12 Cox C. C. 28. [32-33 Vict., cap. 20, section 56—Can.]

ACCESSORIES AND ACCOMPLICES.

Unlawful Sale of Liquor.—He who purchases intoxicating liquor sold contrary to law, for the express purpose of prosecuting the seller for an unlawful sale, is not an accomplice. *Sup. Ct., Mass., Commonwealth* v. *Downing*, 4 Gray 29.

Accessory before the fact.—Where one orders or advises the commission of one crime, and the principal intentionally commits another he is not answerable as accessory to the crime so committed. *Iowa Sup. Ct. State* v. *Lucas*, 7 N. W. Rep. 583.

ASSAULT.

Self-defence.—The right of self-defence cannot be made to depend upon whether a gun is loaded or not, or will or will not shoot, unless it be shown that the person upon whom it was attempted to be used knew that it was not loaded, or would not shoot. *Tex. Sup. Ct., Bode* v. *State*, 8 Rep. 377.

The right of self-defence must be exercised within the limits of mere defence and protection under an apparent necessity to avert, by force, an unlawful and violent attack; and it is not enough that the party believed himself in danger, but the proof must satisfy the jury that he had reasonable ground for that belief, and that when he acted the danger was impending, and that he had resorted to all other means of averting it. *May* v. *State*, 6 Tex, App. 191.

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A party is allowed to act, and act promptly, upon his apprehensions and expectations, but only when he can shew from the conduct or words of the other party that his apprehensions and expectations are reasonable. *Ib.*

AUTREFOIS ACQUIT OR CONVICT.

Former Acquittal.—When a defendant interposes a plea of *autrefois acquit*, the *onus* of proving such special plea is upon him. *Tex. Ct. of App.*, *Hosier* v. *State*, 3 Tex. L. J. 87.

BURGLARY.

Form of Indictment.—An indictment for burglary averred that the "defendant broke and entered a stable," without also averring that the stable was a "building." On the objection that it would not be presumed a stable was a "building," but the fact ought to be averred in order to bring the case within the statute in relation to burglary, it was *held* the objection was not well taken. A "stable," as that word is commonly used, is a "building," and may well be included in the class of structures denominated in the Statutes as "other buildings." *Ill. Sup. Ct.*, *Orrell* v. *People*, 94 Ill. 456. [32-33 Vict., Cap. 21, sec. 45, Can.]

Intent to Steal.—Where the accused is charged with having feloniously broken into a store "with intent to steal," evidence is admissible to show that certain articles were *actually* stolen from the store at the time it was broken into and entered. *La. Sup. Ct.*, *State* v. *Woods*, 31 La. Ann, 267.

CHALLENGING JUROR.

Waiver.—Objections to a juror on the ground of incompetency are waived by failing to challenge at the proper time. *Oreg. Sup. Ct.*, *State* v. *McDonald*, 8 Oreg. 113.

For Cause.—That a petit juror had heard the testimony at a former trial, is not cause for challenge, it not appearing that, when empanelled, he had any opinion in the case. *Shields* v. *State*, 8 Tex. App. 42.

CHARACTER.

Evidence of.—Evidence of good character is always admissible in a criminal prosecution, and should always be considered by the jury, not only as bearing on the main question of the defendant's guilt, but, if guilty, in determining the degree of the crime. *Iowa Sup. Ct.*, *State* v. *Jones*, 52 Iowa 150.

If all the evidence in a case, including defendant's evidence of good character, shews him to be guilty, his character cannot justify, excuse, palliate or mitigate the offence. *Mo. Sup. Ct.*, *State* v. *Kilgore*, 70 Mo. 546.

CIRCUMSTANTIAL EVIDENCE.

Collateral Facts.—Evidence may be given as to collateral facts, if they are so connected with the main fact as to be material in the inquiry as to such main fact, or if they become material by being so connected

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with the main fact by the testimony in the case; so, where the defence to a criminal action was an *alibi*, and the prosecution to overthrow the defence offered evidence that the prisoner, in company with another person, at a particular time, was at a particular place, evidence was *held* admissible in rebuttal to shew that the person named, at the time named, was at a different and distant place. *Mo. Sup. Ct.*, *State* v. *Earnest*, 70 Mo. 520.

CONCEALED WEAPONS.

Evidence of Threats.—Evidence of threats against the life of the accused is always admissible in defence of a prosecution for carrying concealed weapons; the weight to be attached to such threats being matter for the determination of the jury, who must ascertain the real purpose, or what seemed to be the real purpose, of the person making the threat or hostile demonstration and the real, not feigned, sense of insecurity or peril under which the threatened party laboured when the weapon was carried concealed. *Ala. Sup. Ct.—Polk* v. *State*, 62 Ala. 237—[32-33 Vict., cap. 20, ss. 72-76—40 Vict., cap. 30—Can.]

CONSPIRACY.

Declaration of one Conspirator.—If two or more act together with unlawful intent in the perpetration of a crime, they are co-conspirators and principal offenders by reason of their common design and co-operation, and whether they be tried and indicted jointly or separately the antecedent acts or declarations of each pending, and in pursuance of the common design, and tending to throw light upon its execution, or upon the motive or intent of its perpetrators are competent evidence against each and all of them. *Cox* v. *State*, 8 Tex. App. 254.

CRIMINAL RESPONSIBILITY.

Excuse for Crime.—When the law imposes the performance of a duty, the proper performance thereof is not dispensed with, simply because the person thinks that in doing it in an unauthorized manner, or after his own fashion, he has done the best under the circumstances in his judgment. The question is whether he has been guilty of *wilful* neglect, irrespective of motive or intent to violate the law. *N. Y. Sup. Ct.*, *Cowley* v. *People*, 8 Abb. N. Cas. 1, 37.

EVIDENCE.

Criminal Intent.—Where one, in an affray, cut another, from the effect of which cut the injured party died, it is competent, for the purpose o shewing the intent of the prisoner on trial, to prove that the deceased was of great physical strength, and was of a desperate, fighting and ruffianly character. *Wis. Sup. Ct.*, *State* v. *Nett*, 7 N. W. Rep. 344.

FORGERY.

What amounts to.—The alteration of an indorsement of money received, made upon the back of a promissory note, and not signed, does

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not constitute forgery, unless it is shewn that the indorsement was intended as a receipt for the benefit of the maker of the note; the presumption otherwise being that it was only a memorandum made by the payee for his own convenience. *Iowa Sup. Ct., State* v. *Davis*, 53 Iowa 252.

HUSBAND AND WIFE.

Presumed Coercion of Wife.—A wife who takes an independent part in the commission of a crime when her husband is not present, is not protected by her coverture. *Reg.* v. *John*, 13 Cox C. C. 100.

The doctrine of coercion, as applicable to a crime committed by a married woman in the presence of her husband, only raises a disputable presumption of law in her favour, which is in all cases capable of being rebutted by the evidence. *Reg.* v. *Torpey*, 12 Cox C. C. 45.

This disputable presumption of law exists in misdemeanors as well as in felonies, and the question for the jury is the same in both cases. *Ib.*

LARCENY.

Possession of Stolen Goods.—Where there is no other evidence tending to establish the guilt of the defendant except the fact of his having possession of the property stolen, and the jury believe that the defendant gave a reasonable account of such possession, it would then be their duty to acquit. *Nev. Sup. Ct., State* v. *Clifford*, 14 Nev. 72.

How Jury should be charged.—An essential part of the definition of theft is that the property was taken *without the consent* of the owner or of the person holding the possession of it. This must not be ignored in the instructions to the jury. *Lindley* v. *State*, 8 Tex. App. 445.

Unstamped Note.—There cannot, under our law, be larceny of a promissory note requiring to be stamped; nor would double stamping afterwards give the instrument validity in order to uphold a conviction for larceny upon it. *Reg.* v. *Scott*, 2 Sup. C. R. 349.

What taking not Larceny.—Where one in good faith takes the property of another, honestly believing it to be his own, or that he has a right to its possession, he is exempt from the charge of larceny, there being no criminal intent. *Fla. Sup. Ct., Baker* v. *State*, 17 Fla. 406. [2 Hale's P. C. 659.]

LIQUOR SELLING.

Nuisance.—A house in which unlawful sales of liquor are *habitually* made is an indictable nuisance. *N. Y. Ct. of Errors, Meyer* v. *State*, 13 Vroom (N. J.) 145.

Where sold.—A travelling agent for a wholesale liquor dealer doing business in Erie, Pa., sold liquors to people in Mercer County, in some instances collecting the money therefor, but sending all his orders to Erie, whence the goods were shipped direct to the purchasers. He was indicted in Mercer County, tried, convicted and sentenced for selling liquor without a license. *Held*, reversing the judgment of the Court below, (1) That Erie was the place of delivery, and in law the sales were made

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there, and not in Mercer County. (2) That the place of sale is the point at which goods ordered or purchased are set apart and delivered to the purchaser or to a common carrier, who for the purposes of delivery represents him. *Penn. Sup. Ct., Garbracht* v. *Commonwealth*, 11 Pittsburgh L. J. 220.

LOTTERY.

What constitutes it.—A lottery, in its popular acceptation, is a distribution of prizes by lot or chance, and whatever chances are sold and the distribution of prizes determined by lot, this, it would seem, constitutes a lottery. *Ala. Sup. Ct., Buckalew* v. *State*, 62 Ala. 334.

MANSLAUGHTER.

Negligent use of Fire-arms.—A. B. and C. went into a field, in proximity to certain roads and houses, taking with them a rifle which would be deadly at a mile, for the purpose of practising firing with it. B. placed a board, which was handed to him by A., in the presence of C., in a tree in the field as a target. All three fired shots directed at the board so placed, from a distance of about 100 yards. No precautions of any kind were taken to prevent danger from such firing. One of the shots thus fired by one, though it was not proved by which one of them, killed a boy in a tree in a garden near the field, at a spot distant 393 yards from the firing point. A. B. and C. were all found guilty by a jury of man slaughter. *Held* by the Court (Lord Coleridge, C.J., Field, Lopes, Stephen and Williams, JJ.), that A. B. and C. had been guilty of a breach of duty in firing at the spot in question, without taking proper precautions to prevent injury to others, and were rightly convicted of manslaughter. *Reg.* v. *Salmon*, 6 Q. B. D. 79.

Excusable Homicide.—Excusable homicide is when the fatal blow is struck as the only probable means of saving the life of the accused, or of freeing himself from present impending grievous bodily harm.

Voluntary Manslaughter is where one being struck, is maddened by such blow, and in the immediate heat of blood caused thereby, and without any formal design to do the deed, slays his assailant. *Ala. Sup. Ct., Ex parte Brown*, 2 South. L. J. 42.

PRESUMPTION.

Suppression of Testimony.—Where one wilfully suppresses testimony, the presumption is that such testimony, if produced, would be adverse to him. But in the absence of a purpose to suppress the evidence, the presumption does not arise. *Cal. Sup. Ct., People* v. *Hurley*, Pac. L. J., Sept. 11. 1880, page 166.

REASONABLE DOUBT.

When Jury should acquit.—Where there is a reasonable doubt as to one of the facts essential to establish guilt, it is the duty of the jury to acquit. It is not sufficient that the circumstances proved, coincide with

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the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis but the single one of guilt. *Cal. Sup. Ct., People* v. *Anthony*, 2 Week. Jur. 487.

SUNDAY.

A coroner's inquest held on a Sunday is void. *In re Cooper and Cooper*, 5 P. R. 256. [But see *McKinney* v. *State*, 8 Tex. App. 626.]

WITNESSES.

Children.—The admissibility of children as witnesses depends not merely upon their possessing a competent degree of understanding, but also in part upon their having received such a degree of religious instruction as not to be ignorant of the nature of an oath, or the consequences of falsehood. *Ala. Sup. Ct., Carter* v. *State*, 1 South. L. J. & R. 796.

When a child of tender years is produced as a witness in Court, it is the duty of the presiding Judge to examine him or her without the interference of Counsel, further than the Judge may choose to allow in regard to the obligation of a witness' oath; and in a proper case to explain the same to one intelligent enough to comprehend what he says, and then to determine whether or not the child shall be sworn and permitted to testify—*Ib.*

Testimony of a child, a few months over six years old, identifying defendant as one engaged in a robbery. *Held*, properly admitted, and the jury properly cautioned in acting upon the same. *Mich. Sup. Ct., McGuire* v. *People*, 6 N. W. Rep. 669.

Bias of Witness.—The enmity or unfriendliness of a witness to the person against whom he testified may be shown to enable the jury the better to determine in connection with other evidence what weight should be accorded to the witness; but it is not permissible to prove the details of a quarrel or difficulty which gave rise to the enmity or unfriendliness. *Ala. Sup. Ct., Polk* v. *State*, 62 Ala. 237.

Questions Tending to Disgrace.—Although Counsel for a prisoner has a right to ask on cross-examination questions of a female witness which tend to disgrace her the witness is not bound to answer them unless the Judge in the exercise of his discretion requires her to do so. *Reg.* v. *Laliberté*, 1 Sup. C. R. 117. [See *McCreary* v. *Grundy*, 39 U. C. R. 316; *Dickey* v. *Fitzgerald*, 41 U. C. R. 303.]

When a witness voluntarily testifies in chief on a particular subject, he may be cross-examined on that subject, even though his answers may criminate or disgrace him. *Cal. Sup. Ct., People* v. *Freshour*, 1 Ky. L. Rep. 224.

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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

In the Supreme Court of Canada.

[*Reported by* GEORGE DUVAL, Esq., *Advocate, Reporter to the Court.*]

[MARCH, 1881.

ALMON *et al.*, APPELLANTS; AND LEWIS *et al.*, RESPONDENTS.

Will—Annuities—Sale of Corpus to pay.

The bill in this case was filed by the executors and trustees under the will of John Robertson, deceased, to obtain the direction of the Court, as to the rights of the several persons interested under the will.

John Robertson died on the 3rd August, 1876, leaving a will dated 6th August, 1875; and a codicil, dated 21st July, 1876. By the will he devised to his widow an annuity of $10,000 for her life, which he declared to be in lieu of her dower. This annuity the testator directed should be chargeable on his general estate. The testator then devised and bequeathed to the executors and trustees of his will, certain real and personal property particularly described in five Schedules, marked respectively, A. B. C. D. and E., annexed to his will upon these trusts, viz:—Upon trust during the life of his wife, to collect and receive the rents, issues and profits thereof which should be, and be taken to form a portion of his "general estate;" and then from and out of the general estate during the life of the testator's wife, the executors are to pay to each of his five daughters the clear yearly sum of $1,600 by equal quarterly payments, free from the debts, contracts and engagements of their respective husbands. Next resuming the statement of the trusts of the scheduled property specifically given, the testator provides, that from and after the death of his wife, the trustees are to collect and receive the rents, issues, dividends and profits of the lands, etc., mentioned in the said Schedules, and to pay to his daughter Mary Allen Almon, the rents, etc., apportioned to her in Schedule A.; to his daughter Eliza, of those mentioned in Schedule B.;

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to his daughter Margaret, of those mentioned in Schedule C., to his daughter Agnes, of those mentioned in Schedule D.; and to his daughter Laura, of those mentioned in Schedule "E;" each of (his) said daughters being charged with the insurance, ground rents, rates and taxes, repairs and other expenses with or incidental to the management and up-holding of the property apportioned to her, and the same being from time to time deducted from such quarterly payments. The Will then directed the executors to keep the properties insured against loss by fire, and in case of total loss, it should be optional with the parties to whom the property was apportioned by the Schedules, either to direct the insurance money to be applied in re-building, or to lease the property. It then declared what was to be done with the share of each of his daughters in case of her death. In the residuary clause of the Will there were the following words:—"The rest, residue and remainder of my said estate, both real and personal, and whatsoever and wheresoever situated, I give, devise and bequeath the same to my said executors and trustees, upon the trusts and for the interests and purposes following:" He then gives out of the residue a legacy of $4,000 to his brother Duncan Robertson, and the ultimate residue he directs to be equally divided among his children upon the same trusts with regard to his daughters, as are hereinbefore declared, with respect to the said estate in the said Schedules mentioned.

The rents and profits of the whole estate left by the testator proved insufficient after paying the annuity of $10,000 to the widow and the rent of and taxes upon his house in London, to pay in full the several sums of $1,600 a year to each of the daughters during the life of their mother, and the question raised on this appeal was whether the executors and trustees had power to sell or mortgage any part of the *corpus* or appy the funds of the *corpus* of the property to make up the deficiency.

Held, on appeal, that the annuities given to the appellants, and the arrears of their annuities are chargeable on the *corpus* of the real and personal estate subject to the right of the widow to have a sufficient sum set apart to provide for her annuity.

Weldon, Q. C., for the Misses. Robertson, Appellants.

C. G. Gilbert, for Mrs. Almon, Appellant.

J. J. Kaye, Q. C., for Respondents.

TEMPLE, APPELLANT v. NICHOLSON, *et al.* RESPONDENTS.

Bill of Sale—License to grantee to take possession—Progeny—Trover.

This was an action of trover. The declaration charged the appellant with the wrongful conversion of a colt, the property of the respondents. The defendant pleaded *inter alia* that the property of the colt was the property of one *Thomas Hackett*, and, as Sheriff of York, he took the same under an execution against Hackett. The plaintiffs claimed the property

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was vested in them by a mortgage bill of sale, and given to them by Hackett as collateral security with other mortgages, which he had on his real estate. The colt was the progeny of a mare which was mentioned in the bill of sale, and which always remained in the possession of Hackett. In the mortgage there was a proviso that until default the said *Thomas Hackett* might remain in possession of all the property mortgaged, or intended so to be, but with full power to the plaintiffs in default of payment to take possession and dispose of the property as they would see fit. At the time the mare dropped her foal, it was proved that there had been default in payment of both principal money and interest secured by the mortgage.

Held, that the plaintiffs being under the bill of sale the absolute owners of the mare, and after default, entitled to take possession of her, and the foal having been dropped while plaintiffs were such owners, and so entitled to the possession—the colt was their property. "*Partus sequitur ventrem.*"

Gregory, for appellant.

Whetmore, for respondent.

POWER, APPELLANT v. ELLIS, RESPONDENT.

Witness—Refusal to answer questions on Cross-Examination—Privileged Communications—Misdirection.

Plaintiff, respondent, a teller in a bank in New York absconded with the funds of the bank and came to St. John, N. B., where he was arrested by the defendent (appellant), a detective, residing in Halifax, N. S., and imprisoned in the police station for several hours; no charge having been made against him, he was released. While plaintiff was a prisoner at the police station, the defendant went to plaintiff's boarding house, saw his wife, read to her a telegram, and demanded and obtained from her the money she had in her possession, telling her that it belonged to the National Park Bank, and that her husband was in custody.

In an action for assault and false imprisonment, the defendant pleaded *inter alia*, that the money had been fraudulently stolen by the plaintiff, at the City of New York, from the National Park Bank, and was not the money of the plaintiff, and that defendant, as agent for the bank and acting for the bank, received the money to and for the use of the bank, and paid it over to them. Several witnesses were examined, and the plaintiff, having been called as a witness on his behalf, did not, on cross-examination, answer certain questions, relying, as he said, on his counsel's advice and on being interrogated as to his belief that his doing so would tend to criminate him, he remained silent, and on being pressed he refused to answer whether he apprehended serious consequences if he answered the questions proposed. The learned Judge then told the jury that there was

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no identification of the money, and directed them that, if they should be of opinion that the money was obtained by force, or duress, from plaintiff's wife they should find for the plaintiff.

Held, (HENRY J., dissenting), that the defendnat was entitled to the oath of the party, that he objected to answer, because he believed his answering would tend to criminate him.

Per Gwynne, J. There was misdirection in this case.

Barker. Q. C., for appellant.

Weldon, Q. C., for respondent.

ONTARIO.

In the Court of Appeal.

Q.B.] [26th MARCH, 1881.

HARRISON v. PINKNEY.

Lease—Proviso on Determination—Option to harvest crop or be paid for it—Construction.

A lease from D. to the plaintiff of a farm, contained the following proviso:—"And the said lessee agrees to give up possession of said premises before expiration of lease, if sold by said lessor, upon receiving six months' notice, said notice to be given before 1st April, * * and should the said lessor give the said lessee notice to quit premises during any year of said lease, then the said lessee will have the privilege of harvesting and threshing the crops of the summer fallow, or the work done on said summer fallow will be paid for at a fair and reasonable valuation."

D. agreed to sell the land to the defendant on 22nd August, 1877 and on the same day gave the plaintiff notice to quit possession on 1st April, 1878. Plaintiff then put in a crop, and quitted possession pursuant to the notice, and the land was conveyed to the defendant in the latter month. Neither D. nor the defendant offered to pay for either the work or the crop.

Held, affirming the decision of the Court below, (44 U. C. R., 509) that the construction of the proviso was, that the tenant was to have the privilege of harvesting any crops which might have been put in on the summer fallow, unless the landlord elected to pay for them at a valuation; that he had never parted with his property in the crop, and that he was therefore entitled to recover in trover against the purchaser of the farm.

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Per, Patterson, J. A. If the lessor elected to pay for the work he was bound to do so when he gave the notice, or at latest, when he resumed possession.

Robinson, Q. C., for plaintiff.

Tilt, for defendant.

GAUTHIER v. THE WATERLOO MUTUAL INSURANCE COMPANY.

Insurance—Further Insurance—Mistake.

The assured, under a policy containing a condition, "that the Company is not liable * * if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing, signed by duly authorized agent," effected an insurance with the M. Insurance Company, which was void at their option, on account of a similar condition, the policy with the defendants not having expired as a matter of fact, though plaintiff was led to believe it had.

Held, affirming the judgment of the Court below, (44 U. C. R. 490) that the plaintiff could not recover; for in point of fact there was a further insurance which was voidable only, and not void; and the defendants' liability was not dependent upon whether the M. Insurance Company's policy were finally to be adjudged valid or not; the stipulation as to further insurance being designed to apply to all cases of policies subsequently existing in point of fact, without reference to their validity or effect.

Crickmore, for plaintiff.

Bowlby, for defendant.

Q. B. and C. P.]

HOWARD v. BICKFORD.

(Two Actions.)

Principal and agent—Sale on commission—Right to commission.

The rule that the agent is entitled to his commission only upon a due and faithful performance of all the duties of his agency in regard to his principal, is not applicable to this case where the commission had been earned, and the relation of principal and agent had ceased; the alleged omission of duty being that the agent did not report to his principal a difference of opinion expressed by the other party to the contract as to its construction.

The plaintiff, as agent of the defendant, bought from the G. W. Ry. Co. a quantity of rails, for which he was to receive one dollar per ton commission, payable, one-half when the defendant should sell them, and the

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balance when he received payment for them. The defendant having failed to sell them, appropriated them by laying some down upon, and distributing the remainder along a road in which he had a controlling interest.

Held, that the plaintiff was entitled to his commission.

The defendant believing, and being led by the plaintiff, who was acting *bona fide* in so representing, to believe that the advantage which he would gain on a re-sale was extravagantly large, offered in addition to a commission on the purchase of rails, the sum of $1,000, which was paid by draft drawn by the plaintiff upon, accepted, and paid by the defendant. The defendant believed that the $1,000 was to have been illegally used by the plaintiff in effecting the purchase, and the plaintiff knowing this, left him under that impression. The expected advantage was not obtained.

Held, that the defendant was not entitled to recover back the $1,000 so paid.

E. Martin Q. C., for plaintiff.

Hector Cameron, Q. C., for defendant.

C. P.]

WALTON v. THE CORPORATION OF THE COUNTY OF YORK.

Negligence—Ways—Ditches—Obligation to Fence or Grade.

Action for negligence in not keeping in repair a County road. The plaintiff in driving along the road was carried into the ditch by his horse which shied at some object. The travelled portion of the road, which was 30 feet wide, sloped gradually from the crown to the edge of the ditch, which was 4 feet wide at the top, 2½ at the bottom and 15 inches deep measuring from its edge. At the trial the plaintiff obtained a verdict for $400; and the Court below made absolute a rule for a non-suit (30 C. P. 217), which also asked in the alternative for a new trial, holding that the having no guards or railings to the ditch was no evidence of neglect to keep the road in repair.

Held, that, as the question whether or not such a place required protecting guards, was a question of fact, and as there was some evidence of danger here, the case was not one that could properly have been withdrawn from the jury, and the appeal was therefore allowed.

The question of fact to be determined is, whether the road, having regard to all proper considerations, was in a state reasonably safe, and fit for the ordinary travel of the locality.

The case, coming as it did before this Court, the question of a new trial was left untouched. See *Hamilton v. Myles*, 24 C. P., at p. 325.

Donovan, for plaintiff.

J. K. Kerr, Q. C., for defendsnts.

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THE CHANCELLOR.]

LIVINGSTONE v. WOOD.

Appeal upon question of fact—Balance of Testimony.

The Court below having found upon the evidence (27 Gr. 515), that the plaintiff was entitled to redeem a bond for $4000 assigned to the defendant to secure $2000, the defendant giving a separate agreement to re-assign on payment of the loan and interest;

Held, that though the evidence as printed appeared to favour the defendant's view, yet not to such an extent as to show clearly that the learned Judge who saw the witnesses was wrong, the decree should not be disturbed.

W. Cassels, for plaintiff.

Osler, Q. C., for defendant.

[PROUDFOOT, V. C.

BLAKE v. KIRKPATRICK.

Contract of hiring—Rescission of Contract—Ground for Rescinding.

The plaintiff agreed with the defendant to serve him as manager of a tannery for six years, the agreement reciting that he was a practical tanner and was to manage the works, while the defendant should furnish the capital. He also agreed to disclose to the defendant a secret way of tanning which defendant was not to use after the agreement, except in connection with plaintiff, and the secret process was to be carried on in the works.

The defendant discharged the plaintiff in about seven months, alleging among other things that he was not a practical tanner, that he was not using the secret process, and that he had not disclosed that process to the defendant.

Held, reversing the judgment of Proudfoot, V. C. (27 Gr. 86) upon the evidence, that the defendant was a practical tanner, within the meaning of the agreement; that the manufacture of leather was being carried on according to the secret process; and that as no time was limited for disclosing the secret process, the plaintiff was not in default, and therefore the defendant, who had never asked for the disclosure, had no right to dismiss the plaintiff for non-disclosure. A reference was therefore directed as to the damages sustained by the failure of the defendant to perform his part of the agreement, and for the dismissal.

W. Cassels, (with him, *F. Lefroy*), for plaintiff.

McMichael, Q.C. (with him, *Seager*), for defendant.

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DUFF v. THE CANADIAN MUTUAL INSURANCE CO.

Mutual Insurance Companies—Separate branches—Guarantee Capital Fund—Liability of Policy-holders.

The defendants, a Mutual Insurance Company, had divided their business into several branches, pursuant to the Act, and had raised a guarantee capital fund. All losses were paid out of the guarantee fund. In two branches in which the policies were cancelled, it was proved that the amounts to be collected on the premium notes would not pay the losses in those branches.

Held, affirming the decision of Proudfoot, V. C., (27 Gr. 391), that the policy-holders in the solvent branches were not liable in respect of any sums paid for losses appertaining to other branches; but merely for the balance if any which might be found due from them respectively for moneys paid out of the guarantee fund for their losses, expenses, etc.

Semble, that whether the power of assessment was to be exercised in the discretion of the Directors, or was obligatory upon them, it is not in the power of the Court of Chancery to do what the Directors might or should have done.

Duff, for plaintiffs.

E. Martin, Q.C., R. Martin, Q.C., Osler, Q.C., J. W. Gibson and *Laidlaw*, for Defendants.

Co. J. HASTINGS]. [BURTON, J. A., 22nd MARCH. 1881.

In re LEWIS & CO., INSOLVENTS.

Insolvent Act 1875, *Sec.* 68—*Effect of recovery thereunder of Debts to Insolvent.*

Held, affirming the order of the County Judge of Hastings, that where certain creditors had in the name of the assignee recovered a claim due the Insolvent, under sec. 68 of the above Act, the money so recovered belonged to those creditors, and the estate had no longer any interest in the matter.

Where moneys in such a case were paid to the assignee and he refused to pay them over to the creditors, who had instituted the proceedings their proper remedy was by summary application to the County Judge.

J. K. Kerr, Q. C. (with him, *Holden*), for appeal.

Maclennan, Q. C., contra.

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In the Queen's Bench.

[11TH MARCH, 1881.

STEINHOFF v. THE MERCHANTS' BANK.

Liability of Bank receiving note for collection—Neglect to give notice to Endorser.

The plaintiff, a customer of the defendant's branch bank at Chatham handed the Chatham manager for collection a note made by G. C., and endorsed by T. C., both of whom lived in Detroit, where the note was payable, which the Chatham manager knew. The Chatham branch stamped above the endorsement of T. C. a special endorsement to themselves, but the Chatham manager, without endorsing the note, sent it to the Windsor branch for collection—Windsor being very near Detroit—without any instructions as to the place of residence of the endorser, who, however, was well known in Detroit. The manager of the Windsor branch endorsed it to the cashier of the First National Bank, Detroit, and sent it to him for collection. Payment having been refused upon presentation, they handed it to a notary, who duly protested it, but inclosed the notice for T. C., the endorser, in the envelope containing the notice to the Windsor branch, addressed to the manager of the latter. A clerk in the Windsor branch sent the notice for T. C. to the Chatham branch, which was duly posted at Windsor, but was never received from the Chatham post office, and T. C., the endorser, never received any notice, until notice of suit. The Chatham manager received the protest by due course of mail, and could have seen from the protest, in time to rectify his mistake, that T. C. had been given a wrong address. The defendants up to the time of sueing the endorser held the note for collection only, but to give title to them to sue it was agreed that they should hold it as collateral to plaintiff's account. They sued T. C. in Detroit, who defended for want of notice, and a verdict was found for defendant.

The maker was shown to he worthless, while the endorser was good for the amount. This action was then brought to recover the amount of the note which had thus been lost to the plaintiffs.

Held, that the defendants were liable to the plaintiff by reason of their neglect to give the proper information as to the residence of the endorser for the guidance of the notary, and that they could not set up the alleged loss of the notice sent to the Chatham branch by the Windsor branch as a reason why they were unable to notify the endorser, as they said they would have done if they had received it, for the loss of the notice would not have happened but for their original neglect in not furnishing the proper address to their agents for collection.

Held, also, that assuming that a notice served on the endorser on the day of the receipt of the protest at Chatham would have been good. Since this might have been done by using exertion, the defendants were negligent in not discovering and endeavouring to rectify the error which was apparent on the face of the protest.

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In Chancery.

[BLAKE, V. C., 23RD FEBRUARY, 1881.

HILL v. THE MANUFACTURERS' AND MERCHANTS' INSURANCE COMPANY.

Mutual Insurance Company—Receiver—Assessment on Premium Notes.

On application made to the Court to add the persons who had signed premium notes as parties in the Master's office, and to direct the Master to assess the amounts due upon the notes, and to order payment of the same to the Receiver, from time to time, it was shown that the Directors had not made any assessment upon the notes pursuant to R. S. O., cap. 161, secs. 45, *et seq.*

Held, that clause 75 of 36 Vict., cap. 214, which gave this power to a Receiver, having been omitted from the Revised Statute, the liability attached only upon assessment by the Directors, and the Court could not add to or alter the liability of the parties who had made the notes by referring it to the Master or a Receiver to do that which the Directors alone were empowered to do.

[24TH FEBRUARY, 1881.

McARTHUR v. PRETTIE.

Appeal from Master—Taking further Evidence at sittings.

On an appeal from the Master on a question of the weight of evidence, the Court though not satisfied as to what was the actual truth of the case, could not say that the Master was wrong, and therefore dismissed the appeal with costs.

Liberty was given to the appellant however, if he chose, to examine the witnesses again at the next sittings before the learned Judge, who heard the appeal; in order to enable him to dispose of the matter with greater satisfaction to himself, in which case, costs would be reserved.

[PROUDFOOT, V. C., 10TH MARCH, 1881.

WEBSTER v. LEYS.

Demurrer—Style of Cause—Parties—Feme Covert—Executors.

In the style of cause the female defendants were described as the "wives, of etc.," respectively.

The bill did not allege that these female defendants were married, but the demurrer assumed it.

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On demurrer for want of parties because the husbands were not joined,

Held, that what was contained in the style of cause of the bill was description only, and not a statement of fact, and the demurrer was overruled.

In a bill for administration the only surviving executor of the testator was made a party, the bill alleging that the deceased executors received no part of the testator's estate as executors, nor did other than formal acts in relation thereto.

On demurrer *ore tenus* for want of parties,

Held, that as the deceased executors had never received assets, and nothing was due from their estates, their representatives were not necessary parties to this suit.

Moss, (with him, *Kingsford*), for the demurrer.

Boyd, *Q. C.*, (with him, *Black*), contra.

SIEVEWRIGHT v. LEYS.

Feme Covert—Separate Estate—Demurrer—Parties.

Under a trust in a will, which took effect in 1856, to sell and divide the proceeds of realty a conversion was effected. The devisee in trust within a fortnight after his testator's death by his own will, appointed part of the proceeds to a married woman, having proved his testator's will as executor.

Held, on demurrer for want of parties to a bill to which the married woman was a party, but not her husband, and which alleged the marriage, that on the authority of *Lawson* v. *Laidlaw*, 3 App. R. 77, the married woman was entitled to the property as a *feme sole*, and her husband was not a necessary party.

In such a case it was objected *ore tenus* that the estate of the first testator was not properly represented by the executor of the second testator.

Held, overruling the demurrer that both estates were in fact represented, and though it might be necessary during the progress of the suit to have different persons represent the two estates, yet this was not a subject of demurrer.

Moss, (with him, *Kingsford*), for the demurrer.

Boyd, *Q. C.*, (with him, *Black*), contra.

VANKOUGHNET v. DENISON & WYNNE.

Demurrer—Covenant against building—Description.

The defendant D. being the owner of real estate covenanted with the purchaser of one-quarter of an acre of land, and his assignees that a square of about six acres, retained by him, should always remain unbuilt

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upon, except one residence with necessary outbuildings, etc., and the purchaser covenanted with the vendor that he would not allow any business such as a tavern, etc., to be carried on upon the parcel bought by him.

To a bill by the assignee of the purchaser to restrain the defendant from erecting a building upon part of the square, not within the exception of the covenant, the defendant W. demurred on the ground that she had no notice of the covenant. And the defendant D. demurred, (i) because the bill was too indefinite in describing the land only as so many feet in width and so many feet in length, and bounded on two opposite sides by certain named streets, and being more particularly shown on the map of Toronto published in 1857; (ii), because it was a case of hardship, which the Court would not enforce that his lot of six acres should be kept vacant; (iii) because the plaintiff while seeking performance of D.'s covenant, did not offer to perform his own.

Held, overruling the defendant W.'s demurrer, that as the bill alleged a joint act of the defendants, and as D. was the covenantor, he must have had notice, and W. being joined with him, must stand or fall with his right or liability.

Held, overruling defendant D.'s demurrer on the first ground, that the specification of the two boundaries, and the number of feet in length and breadth, and the reference to the published map was a sufficient description.

Held, as to the second ground, that the difference in size of the plaintiff's and defendant's lots did not make a case of hardship on D. as it must be presumed that D. received an equivalent for his covenant not to build; and if any hardship had arisen *since the date* of the contract, that was no defence to the bill.

Held as to the third ground, that the covenants were not mutually dependent, and it was not necessary for the plaintiff to offer or allege performance of his covenant.

Maclennan, *Q. C.*, for plaintiff.

Delamere and *Black*, for defendants.

McGARRY v. THOMPSON.

Will, construction of — Dower — Election — Support and Maintenance — Conversion.

A testator gave and devised all his real and personal estate to trustees to sell the realty and get in the personalty, and, after paying debts, etc., to invest proceeds upon trust to pay annual incomes to his two sons, E. and A., who were to maintain their mother during her life; and after the death of each of the sons to hold one moiety upon trust, to divide same amongst such of the children of each as should be living at his death, and

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the issue of such as should be dead as tenants in common according to the stocks, and not to the number of individual objects, and so that the issue of any deceased child should take, by way of substitution amongst them, their share or respective shares only, which the deceased parent would have taken.

Held, that such a provision for a widow was not sufficient to put her to her election, and that she was therefore entitled to Dower in addition to the provision in the Will: following *Laidlaw* v. *Jackes*, 25 Gr. 293, affirmed on re-hearing 27 Gr. 101; and that she was also entitled to a declaration, that she was entitled to maintenance and to a reference to ascertain what would be a proper sum to allow, to be charged in equal amounts on the bequests to E. and A.

Held, also that a complete conversion had been effected by the trust for sale and that the interest sof the sons were to be ascertained as if the subject of devise were personalty only; that the sons only took life estates; and that E. having died without issue, there was an intestacy as to his share, which was however, subject to a proportion of the charge for maintenance.

J. H. Macdonald, for plaintiff.

Arnoldi, for defendant.

[11TH MARCH, 1881.

In re McDONALD'S WILL.

Devise—Mortmain—Devolution of subject of Devise.

Where a devise directing a conversion of realty, failed under the Statutes of Martmain, and there was no residuary legatee, nor any valid gift over.

Held, that the estate descended to the heirs-at-law in preference to the next of kin.

Fraser, for petitioner.

W. Mortimer Clark, for the charities.

Roaf, for testator's widow.

R. Meredith, for legatees.

SCOTT v. DUNCAN.

Will—Construction of— Estate Tail.

The testator directed all his lands to be sold and proceeds to be retained by his executors till the youngest child should attain twenty-one, when

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the amount should be divided; but in the event of any of his children dying without issue before the youngest should attain that age, the share of the one dying to go to the survivors.

Held, that the words used did not create an estate tail or *quasi* entail; and as the subject was personalty the effect of that construction would be to give the pre-deceasing child an absolute interest which would pass by Will.

It was not contended that the shares of the legatees were not vested.

J. Hoskin, Q. C., (with him *Creelman*) for plaintiffs.

Cameron and *Ewart*, for defendants.

STEVENSON v. STEVENSON.

Will—Devise of incumbered land—Redemption—Title by—Costs.

A testator directed land, which was incumbered to its full value, to be sold: and, after the charges were paid, the remainder was to be divided among this three sons—unless they should in succession *redeem* the place, of which he gave them the privilege—to Robert first, John next, and James last.

Held, that the privilege of redeeming was, under the circumstances, the right to purchase, and that Robert, by redeeming, had acquired a good title thereto.

Though the bill asked for administration it was in reality a bill asserting title in the plaintiffs; and though the title depended upon the construction of the Will, it was not properly a bill for the construction of a Will; and therefore the plaintiffs were ordered to pay the costs upon dismissal of the bill.

W. Cassels, for plaintiff.

Moss and *Kingsford*, for defendants.

SMITH v. PETERSVILLE, *et al.*

Municipal Councillor—Disclaimer before the time for taking oath—Effect of R. S. O., cap. 174, Secs. 194, 265.

A disclaimer by a councillor elect of the *seat* is equivalent to a disclaimer of the *office*, and sufficient under the Municipal Act.

Three councillors were to be elected for the Village of Petersville. G. obtained 201 votes, M. 201, B. 191. and the plaintiff, 171. Before the time of taking the oath of office expired, G disclaimed the seat. The plaintiff then claimed to sit, but was denied admission to the Council. and a new election was held at which the defendant, E, was returned without opposition. The plaintiff on election day notified the electors of his claim.

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Held, that the object of secs. 194 and 195 of the Municipal Act is to prevent the necessity for a new election, and for that purpose to bring into the Council in the place of the disclaiming councillor the *candidate* having the highest number of votes next after the votes that elected councillors; and that the construction of the defendants that it only advanced the next lowest councillor elect on the poll book one step was wrong.

It was objected that the plaintiff had no *locus standi*, because he had not made the declaration of qualification under sec. 205. It appeared that he had tendered himself for the office, but the Reeve refused to admit his right.

Held, that the Defendants were therefore precluded from raising this objection.

Boyd, Q. C., (with him, *R. Meredith*), for plaintiff.

Hodgins, Q. C. and *Bartram* for defendants.

[THE CHANCELLOR, 12TH MARCH, 1881.

In re JARVIS, VENDOR, & COOK, PURCHASER.

Insolvent Act of 1869—*Sale of Land under—Validity of.*

An assignee in insolvency selling land belonging to the insolvent, under the statutory power conferred on him by the Insolvent Act of 1869, s. 47, must strictly observe the terms of the Act.

Held, that a title conferred upon the vendor by a sale in which the assignee had not strictly followed the terms of the Act as to advertising, was not such a title as the purchaser was bound to accept.

The vendor had paid taxes upon the land for more than ten years.

Held, that there was no such possession in this case by such payment merely, as would extinguish the right of a claimant to the land.

OUSTON v. GRAND TRUNK RAILWAY CO. AND WILLIAMS.

Demurrer—Railway Act, C. S. C., cap. 66—Payment of compensation to wrong party—Liability of Railway Company.

The defendants, the Railway Company, paid the full compensation for lands taken by them for the use of their Railway to the defendant, Williams, who was only tenant for life.

Held, on demurrer, that the plaintiffs, who were entitled in remainder, were entitled as against the Railway Company under sub-sec. 22 of sec. 11 of the C. S. C., cap. 66, to recover their proportion of the compensation, according to their interest in the land.

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Semble, that the payment to the defendant, Williams, of money to which the plaintiffs were entitled, without authority of the plaintiffs, became money had and received by Williams to the use of the plaintiffs, and that the plaintiffs were entitled to a direct remedy against the defendant, Williams.

ALLAN v. McTAVISH.

Fraudulent conveyance—Evidence—Res Judicata—R. S. O. cap. 109, secs. 1 and 2.

A father had purchased land and had given a mortgage back without getting a deed to himself. He allowed the land to be sold for taxes and bought it himself and procured a deed. The plaintiff recovered judgment upon the covenant in the mortgage and filed this bill to obtain execution against this and other lands of the father, which he had conveyed to his sons pending the plaintiff's action—they giving a mortgage back to their father and mother for the alleged consideration of support and maintenance, and for this purpose to set aside the transactions as fraudulent and void against creditors.

Held, upon the evidence that the transactions were a fraud upon creditors.

Held, that the judgment obtained against the father upon the covenant in the mortgage was *res inter alios judicata* as against the sons, the grantees of the father, and was not admissible in evidence against them. But

Held, that the mere production from the proper custody of the mortgage itself, signed by the father, which was more than twenty years old, was sufficient proof of it under R. S. O., cap. 109; and whereas this Act makes such a document evidence of the truth of the recitals contained in it until they are shown to be untrue, it was sufficient evidence of the indebtedness of the father, and might be used for that purpose as against the sons, the grantees.

W. Cassels, (with him, *A. C. Galt*,) for plaintiff.

Osler, Q. C., for defendant.

McGEE v. CAMPBELL.

Insolvent Act of 1875—Unintentional omission of Assets from Insolvent's Statement—Effect of.

C. & C. placed in the Schedule upon Insolvency certain shares of the C. V. Railway Company, belonging to them standing in the name of the defendant, a member of the partnership. The defendant, one of the promoters of the Railway Company, and its subsequent Vice-President, had

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had allotted to him other shares by resolution of the Directors as a compensation for his services, for which, however, no scrip was issued. These he forgot to put into his Schedule of personal assets, and at the time, they had no market value, the Railway Company being in difficulties, and its works stopped.

In the absence of the President, the defendant, the Vice-President managed the affairs of the Railway Company, and as a compensation by way of gratuity, resolutions was passed, placing two sums of money at his disposal to relieve anticipated want, but as to the second sum the fact was not communicated to him till after his discharge in Insolvency.

Held, that as there was no fraudulent or wilful omission to omit the C. V. Railway shares from his Schedule the plaintiff could not succeed as to these. And as to the sum voted by way of compensation there was no debt due from the Company to defendant, and at any rate that the non-insertion of these moneys in the Schedule was not a fraudulent concealment within the meaning of the Act.

Certain shares in the N. Railway Company became the property of the defendant on the 21st February, 1879, he having held them before that date as trustee, under an agreement that if he could dispose of them to advantage, or make them of any value, he should receive half their value as compensation. He said he was advised that these shares should not be inserted in the Schedule. The shares were of very little market value, but they enabled the defendant to qualify as a Director of the Company, for which he received a salary. The date of his Insolvency was 16th September, 1878. His deed of composition and discharge was dated 2nd October, 1878, and the order confirming the same 1st March, 1879.

Held, that the shares having been acquired after the date of his deed of composition, belonged to him and not to the assignee, but if there were any doubt about it, it would be out of the question to charge him with fraudulent concealment of after acquired property as this was.

[19TH MARCH, 1881.

REID v. REID.

Tenant for life—Dower—Remainder-man—Liability of, as to keeping down interest.

The general rule that tenant for life is bound to keep down interest on a charge on the land, while the remainder-man must pay the principal applied to the following case.

A widow entitled to an annuity under her husband's will, elected to have dower assigned to her instead. The land was subject to certain legacies and a mortgage.

Held, that she was bound to pay one-third of the interest on these claims until they fell due, after which the remainder-man must pay all the interest as well as the principal.

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GILLAM v. GILLAM.

Dower—Election—Ignorantia juris neminem excusat.

A testator bequeathed large legacies to his wife *durante viduitate* in lieu of dower, and more valuable than her dower would have been. She enjoyed them for two years during which the will was in other respects also acted upon. Having then married the brother of her deceased husband, she filed her bill alleging that she had accepted the bequests in ignorance of her right to dower, and praying that dower might be assigned her. In her evidence she swore that she was ignorant of her right to dower until informed of it in 1880, shortly before her second marriage.

Held, that the maxim, *Ignorantia juris neminem excusat* applied, and the bill was dismissed.

[PROUDFOOT, 19TH MARCH, 1881.

JONES v. DAWSON.

Seisin of wife—Tenancy by the Courtesy.

A testator gave to his children all his real and personal property, to be divided equally when the youngest came to the age of twenty-one, subject to a provision that the wife should have all the rents, profits and interest, to maintain herself and educate and maintain the testator's children as long as she remained his widow; but if she married again she was to have £25 per annum, and the remaining rents were to be applied for the benefit of his children. One of the children, Elizabeth, married the defendant Wright, and died in 1875, before her youngest brother or sister had attained twenty-one, but after her mother's second marriage, leaving surviving her husband and two sons. On appeal from the Master it was

Held, that as the widow of the testator married before the death of her daughter Elizabeth, the freehold estate of the widow had ended before that event, and the daughter's estate, when she died, was not a remainder expectant, on an estate of freehold.

Held also, that as Elizabeth took by devise and not by descent, she was technically a purchaser, and her issue could inherit as her heirs without actual seisin in her.

Held, also, that this seisin was sufficient to entitle her husband to a tenancy by the courtesy; and that therefore the Master was right in so finding on all these grounds.

Plumb, for the appeal.

G. H. Watson, contra.

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[BLAKE, V. C., 23RD MARCH, 1881.

THOMPSON v. TORRANCE.

Will by Interrogation—Validity of.

A will was drawn and executed a day or two before the testator's death who was so weak from illness as to have signed by making his mark, though an educated man; the instructions were obtained by interrogation; the will when completed was read over to the testator clause by clause; he expressed assent at the end of each clause and made intelligent remarks, but previous to the completion he had directed a change in the amount of some legacies.

Held, that the will was valid.

Vacation Court.

[CAMERON, J., 25TH MARCH, 1881.

REGINA, *ex rel.*, CLANCEY v. ST. JEAN.

Municipal Councillor—Qualification—Quo Warranto—Right of Elector to, when he is not a ratepayer in ward in question.

The Municipal Act not taking away any rights theretofore existing, the rule applies that where a Statute gives redress by a different mode from the Common Law or previous Statutory methods, without repealing the Statute or prohibiting the Common Law proceeding, the remedies are cumulative.

Where therefore, the defendant, an Alderman elect, had made a declaration which did not state particularly the nature of his estate, the value of the land and the incumbrances on it, according to the Statutory form, but declared that his property was sufficient to qualify him "according to the true intent and meaning of the Municipal Laws of Upper Canada,"

Held, that he had no right to exercise the functions of the office till he had made the declaration prescribed by R. S. O., cap. 174, sec. 265; that the declaration made was insufficient; that the omission to make the proper declaration, which he might make at any time, would not render the office vacant; that his qualification at the time of his election was, notwithstanding the Municipal Act, open to question on a *quo warranto;*

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and that a ratepayer of the city, though neither a ratepayer nor a resident in the ward in question might become the relator. See *in re McPherson & Beeman*, 17 U. C. R. 99.

Regina ex. rel., White v. *Roach*, 18 U. C. R. 226, and *Kelly* v. *Macarow*, 14 C. P. 457, distinguished.

Mosgrove, for relator.

J. W. W. Ward, for defendant.

In re CLANCEY v. CONWAY.

Municipal Councillor—Qualification.

An unlicensed person, who, under the cover of a license to his son, whether in collusion with the latter, or on his own responsibility, sells liquors by retail, is not disqualified under S. 74 of the Municipal Act, from holding the office of Alderman, though he may have rendered himself liable to penalties for breach of the Liquor License Act.

The declaration of qualification not having been made, leave was given to the defendant to make the same within ten days, otherwise, following *Reg. ex rel. Clancey* v. *St. Jean*, supra, leave was granted to file an information, on the ground that the defendant illegally exercised the franchises of the office.

Mosgrove, for relator.

J. W. W. Ward, for defendant.

Common Law Chambers.

[OLSER, J., 16TH MARCH, 1881.

JONES v. GALLON.

Breach of promise — Examination of parties under C. L. P. Act — Practice.

This was an action for breach of promise of marriage. The defendant obtained the usual order to examine the plaintiff after issue joined under the C. L. P. Act. A summons to set aside the order, was made absolute by Mr. Dalton, on the authority of *Woodman* v. *Blair*, 8 Pr. R. 179.

Thereupon a summons was obtained by way of appeal from Mr. Dalton's order; and upon the return *Wm. Mulock* showed cause and contended that the parties to an action of this nature are not compellable witnesses; R. S. O., cap. 62, sec. 6. The order to examine was therefore useless and improper, as the party sought to be examined could not be compelled to answer.

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W. H. P. Clement, contra, argued that the examination under the C. L. P. Act was for the purpose of obtaining discovery, and not for the purpose of using the depositions in evidence; and though the depositions could not be given in evidence on account of R. S. O., cap. 62, sec. 6, yet, under sec. 165 of the C. L. P. Act, allowing depositions taken in this way to be used as evidence *saving all just exceptions*, these depositions might be included in the *exceptions* and excluded from the jury, while the party examining his adversary might still benefit by the discovery he obtained from them.

OSLER, J.—I think the order complained of is right.

This is an action for breach of promise of marriage.

In such an action, either party to the Record, might, as the law formerly stood under C. S. U. C., cap. 32, sec. 5, "An Act respecting Witnesses and Evidence" have been called and examined as a witness at the suit of the opposite party, and by section 190 of the C. L. P. Act, C. S. U. C., cap. 22, wherever that was the case, either party might interrogate the opposite party for the purpose of discovery.

But, by 33 Vict., cap. 13, R. S. O., cap. 62, sec. 5 (*inter alia*) of the Act respecting witnesses and evidence was repealed, and it was provided, (sec. 4) that the parties to a suit should, except as thereinafter excepted, be competent and *compellable* to give evidence on behalf of themselves, or of either or any of the parties to the suit. One of the exceptions was contained in sec. 5. (*b.*) sec. 6 of R. S. O. Nothing herein contained shall apply to any action for breach of promise of marriage.

Since this Statute, therefore, neither of the parties to such an action, can be called as a witness by the opposite party, and interrogatories could no longer be administered therein while that mode of obtaining discovery remained on the Statute Book. On the revision of the Statutes, the sections relating to discovery by means of interrogatories administered to the opposite party, were omitted, and instead thereof, the sections relating to the oral examination of the party, adverse in interest, substituted, or rather retained as sufficient for the purpose. These sections are headed "Preliminary Examination of Parties, etc., Discovery." And Section 165, provides that office copies of the depositions taken upon such examination certified by the Examiner, shall be received and read in evidence, saving all just exceptions.

It appears to me, therefore, that as discovery by interrogatories could only have been obtained under the former practice, when the party interrogated was liable to be called and examined as a witness by the opposite party, and discovery by means of oral examination is now substituted for that by interrogatories, and the depositions are made evidence at the trial, such oral examination must be limited to those cases in which the party to be examined is compellable to give evidence by or on behalf of the opposite party.

I have not overlooked sec. 18 of R. S. O. cap. 62, which is taken from sec. 15 of the C. S. U. C., cap. 32. It is plain, however, that that section as it

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now stands is only intended to provide for those cases in which, by the same Act, the opposite party can be called as a witness.

The summons on appeal is therefore discharged, costs to be costs in the cause to the plaintiff.

[18TH MARCH, 1881.

SATO v. HUBBARD; UNION MUTUAL INSURANCE COMPANY, GARNISHEES.

Attachment—Attorney—Affidavit—Garnishee disputing liability.

The affidavit to obtain an attaching order may be made by the Attorney of the judgment creditor or by a partner of the Attorney.

A debt is garnishable when it consists of money due under an award and decree of the Court of Chancery, although the full amount is not ascertained by reason of the costs not having been taxed. When the amount, in such a case, is finally ascertained, execution may be issued against the garnishee, although he still disputed the liability.

Tilt, for judgment creditor.

Allan Cassels, for judgment debtor.

A. C. Galt, for garnishees.

THE CANADIAN BANK OF COMMERCE v. CROUCH; TRUSTEES OF SPADINA AVENUE METHODIST CHURCH, GARNISHEES.

Attachment—Attorney's lien—costs.

In garnishee proceedings a Court of Law will, as against the attaching creditor, protect an attorney's lien for costs of the proceedings under or by means of which the debt attached has been recovered, when the garnishee has notice of the existence of the lien.

This rule extends only to the costs incurred in the particular suit or proceeding and not to the attorney's general costs against the client in other matters.

A Court of Equity would restrain a creditor who has obtained an attaching order at law from enforcing it against a fund recovered through a suit in Equity to the prejudice of the attorney's lien for costs in that suit.

Wilson, (*Morrison, Wells and Gordon,*) for attaching creditors.

Hearn, (*Morphy, Winchester and Morphy,*) for the Attorney.

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Chancery Chambers.

[BLAKE, V. C., 21ST. MARCH, 1881.

HAYES v. HAYES.

Appeal from Master's Report before filing same.

The report of the Master, dated the 2nd March, 1881, was taken out by the plaintiff's solicitor, but not filed till after notice of appeal therefrom was given. Notice of appeal was served on the 14th March for the 21st of March, and the report was filed on the 15th March.

Held, that the appeal would not lie from the Report until the same had been filed; as, until filing, it remainded a proceeding in the Master's office, and was not before the Court, and the appeal was therefore not heard.

Semble, (though it was not necessary to rule upon this point) that the seven days' notice of appeal should be seven clear days.

Donovan, for the appeal.

E. Douglas Armour, contra.

In re McCOLL, McCOLL v. McCOLL.

Administration—Commission.

A mortgagee of the property in question refused to take his money, his mortgage having some time to run.

The property was sold by direction of the Court for $3000, subject to the mortgage. The purchaser assumed the mortgage and paid the balance, amounting to $1700, into Court.

The Master held that the $1700 was the amount upon which the commission under G. O. 638 was to be calculated. On appeal from the ruling, *Held*, that the Master's ruling was correct.

Semble, if the mortgagee had consented to a sale free from his mortgage, commission would have been allowed on the whole $3000.

H. Symons, for plaintiff.

Plumb, for infants.

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NOVA SCOTIA.

In the Supreme Court.

[8th JANUARY, 1881.

SILVER v. DOMINION TELEGRAPH CO.

(Before DesBarres, Smith, James and Weatherbe, J J.)

This action was brought against the defendant company for wrongfully and maliciously transmitting over their wires from Halifax to St. John, and causing to be printed and published in the *Daily Telegraph* of the city last named, and elsewhere, the false and defamatory message, of and concerning the plaintiffs, i.e., "John Silver & Co. (meaning the plaintiffs) wholesale clothiers of Granville Street have failed. Liabilities heavy;" meaning, etc., whereby many customers ceased to deal with plaintiffs, etc. A verdict was found for the plaintiffs for $7000. The plaintiffs described themselves as wholesale and retail merchants in Halifax, doing business under the name of John Silver & Co., and there was no evidence of any firm doing business in Granville Street of the name of John Silver & Co. other than that of plaintiffs. The original telegraphic message was not produced, but a copy of the newspaper containing it was received in evidence, the publisher of the paper having stated that he never searched for the telegram, that it was no use to do so, that he had never had the custody of the telegram, and that such telegrams were generally destroyed the morning after they were received. There was no express evidence to show that Snyder, who furnished the telegram, was appointed by defendant as their agent, but the publisher swore to an arrangement by which he took telegraphic information from the defendant company, paying only for such telegrams as he published, and added that Snyder was the head man in St. John, and had been so ever since the establishment of the company, that his transactions were entirely with Snyder, whom he took to be acting as agent of the company, the bills being rendered in their name by Snyder.

Held, (Weatherbe, J., *dissenting*,) that the jury were warranted in finding that the libel complained of pointed unmistakeably to the plaintiffs, that the copy of the newspaper had been properly received; that the jury were warranted in finding that Snyder in furnishing the telegram was acting as agent of the defendants, and that the verdict, although perhaps larger than the Court if empannelled as a jury would have given, could not be set aside as excessive.

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THE

CANADIAN LAW TIMES.

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CAN THE JURY CONVICT OF COMMON ASSAULT UPON AN INDICTMENT FOR MURDER OR MANSLAUGHTER?

This paper was addressed to the Faculty of Law of the University of McGill College in February last, by the writer, who was awarded a prize therefor upon taking the degree of B.C.L.

THE answer to this question, at Common Law, was undoubtedly in the negative. It relied "on a general and well-established rule of law, which was, that upon an indictment for felony, a person should not be convicted of a misdemeanor. And the reason of this seems to be well founded, as defendants, in cases of misdemeanor, were entitled to certain privileges and advantages which those charged with felony, were not" (*a*). They might have full counsel, a copy of the indictment, and a special jury (*b*). "Therefore, by allowing a person indicted for felony, to be convicted of misdemeanor, it was virtually depriving a defendant of those advantages" (*c*).

But the prisoner, by our Statute, 4 & 5 Vict., cap. 24, sec. 9, which corresponds to the Imperial Statute, 6 & 7 Wm. IV., cap. 114, sec. 1, became entitled, in cases of

(*a*) *Dearsly's* Crim. Process 67.
(*b*) *R. v. Westbeer*, Leach 14-15.
(*c*) *Dearsly's* Crim. Process 67.

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felony, to full counsel, and to a copy of the depositions, and though not entitled to a copy of the indictment, yet, it was but matter of courtesy to permit his counsel to inspect it.

"With regard to a special jury, in the great majority of cases, a prisoner would not desire it, and it can in no case be obtained unless the indictment has been removed by *certiorari*" (*d*).

Then, if the law had not empowered the jury to find a verdict of guilty of assault upon an indictment for felony, it would have led to a state of things like that which existed, for a year, in England, where it "was found to be extremely inconvenient; for the prisoner, proved to have committed a grave offence of which he was accused, either got off with perfect impunity, or a new indictment was preferred against him before another jury. In the former event, public scandal was given by a failure of justice, and in the latter, the accused party was unnecessarily harassed, and unnecessary expense and trouble were occasioned by a second trial" (*e*). Besides, in the latter event, the accused party lost one advantage, "as where he was charged with felony he *might* peremptorily challenge jurymen, which he could not do if indicted for a misdemeanor" (*f*).

But our Legislature proceeded in the same session, (4 & 5 Vict.) to pass cap. 27, sec. 37, correspondent to the Imperial Statute 7 Wm. IV. and 1 Vict., cap. 85, sec. 11, and which was successively re-enacted by C. S. C., cap. 99, sec. 66, and 32-33 Vict., cap. 29, sec. 51. Section 51 enacts that, "on the trial of any person for any felony whatever, where the crime charged includes an assault against the person, *although an assault be not charged in terms*, the jury may acquit of the felony, and find a verdict of guilty of assault

(*d*) *Greaves'* Lord Campbell's Act 14.
(*e*) Per Ld. Campbell, C. J., in *Reg.* v. *Birds*, 2 Den., 216, 217.
(*f*) *Greaves'* Lord Campbell's Act 14.

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against the person indicted, if the evidence warrants such finding . . ." The words in italics are not to be found in the preceding enactments.

It may be well to remark also that the last mentioned Statute (32-33 Vict. cap. 29,) allows a person indicted for felony, to have a copy of the indictment, (sec. 47,) and that, by giving to a person indicted for misdemeanor the benefit of four peremptory challenges, it still allows him the chance of having gained, if convicted of misdemeanor upon an indictment for felony, the advantage of challenging, in cases of non-capital felony, eight jurymen, and in cases of capital felony, sixteen more than he would have been entitled to challenge if arraigned on an indictment for misdemeanor. (Sec. 37).

Now, the solution of the question, "Can the jury convict of common assault upon an indictment for murder or manslaughter?" depends upon the construction to be put on sec. 51. The eleven Judges (*g*) who determined the case of *R.* v. *Birch*, 1 Den. 185, A. D. 1846, which involved the task of construing the corresponding Imperial enactment, laid down the following rule, namely, "The assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment."

It is proposed, with a view of arriving at a solution, to expound, separately, the two component parts of this rule.

It was said by Baron Parke, in *Reg.* v. *Birds* (*h*), where the soundness of the rule was severely questioned, and the deliberations of the Judges ended in a division of six to eight, that as to the first part of the rule, there was no difficulty. The language of the Statute is changed from

(*g*) 2 Den. 200, 210.
(*h*) 2 Den. 202.

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"felony" to "crime charged,"—the first, points to the class, the second to the species. The Statute, therefore, applies only where the species includes an assault. This limitation is made clearer, if possible, by examining the words, "the jury may acquit of the felony, and find a verdict of guilty of assault." The "crime charged" is compounded of a misdemeanor (assault) and something more which makes it a felony; and the law allows the jury to acquit of the more serious part, and to convict of the less. This evidently implies that if the words "crime charged" are to be taken as meaning the species, the conviction is one of an integral part of the species. To support the construction that the "crime charged" means the individual crime, that is to say, the crime as expanded in statement on the indictment, the words should have been "crime *as* charged."

If the indictment averred an assault as accompanying a felony which legally does not include an assault, it would be considered as a charge for the crime of an assault, and also of a felony; and most decidedly the Statute could not be called into operation in this case, *R.* v. *Watkins* (*i*). On the other hand, it is not necessary to state an assault in an indictment for a felony which involves an assault; for where the crime charged, includes an assault by implication, the prisoner is sufficiently notified to make full preparation for his trial, and thus the rule is satisfied which requires that, in order to ascertain whether due regard has been given to this sacred right of the subject, the charge should appear, when the record is made up, upon which the prisoner is found guilty, and subsequently punished. Moreover, if the indictment for felony entirely failed, the prisoner could successfully plead *autrefois acquit* to a subsequent indictment for assault.

It has been inferred from *R.* v. *Draper* (*j*), "that where the crime charged in the indictment *may* include an assault,

(*i*) 2 Moo. C. C. 217.
(*j*) 1 C. and K. 176.

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but no assault is expressly or impliedly averred in the indictment, it will depend upon the nature of the crime, *as ascertained by the evidence*, whether it includes an assault or no, so as to come within" the Statute (*k*). But the judges, Tindal, C. J., and Parke, B., who heard that case, afterwards altered their opinion, and concurred in the rule laid down in *R.* v. *Birch* (*supra*) the propriety of which Parke, B. acknowledged once more, as is above mentioned, in *R.* v. *Birds*.

Then, is assault an essential element of murder and manslaughter? It is contended that it is not. The case of homicide by poisoning, is an instance of this. To administer poison with intent to murder, is murder if death ensue; and, if with any other intent, it is but manslaughter. It may or may not, according to the case, involve an assault, which is the act of "one who puts in motion a physical and unlawful force, and thereby creates a reasonable apprehension of immediate physical injury to a human being" (*l*). If, for instance, A. throw B., a woman, on the ground, and by holding her hands, and by placing a bottle containing poison to her lips, compel her to swallow the poison, and so administer it, and B. die thereof,—it would seem difficult to say that such a transaction would not include the commission of a common assault (*m*). But if, on the other hand, C. and D. have mixed a quantity of Spanish flies in some ale, and placed it in such a way as to be taken by a number of persons constituting a bridal party, and it is taken accordingly, and several persons, both male and female, are much injured, and eventually die (*n*)—this is the illustration which it is intended to discuss in order the better to determine the proposition.

Two arguments may be adduced against this proposition. The first is taken from Mr. Sergt. Woolrych's *Treatise on*

(*k*) 2 Den., Am. edit., 131, note (*a*).
(*l*) See 2 *Bishop* on Crim. Law, 6th edit. § 23.
(*m*) See *R.* v. *Dilworth et al.*, 2 Moo. and R. 531, 534, note (*b*).
(*n*) See *R.* v. *Walkden et al.*, 1 Cox 282.

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Misdemeanors, pp. 176, 177, where he says:—"In its legal acceptation, however, the common assault does not mean merely that ordinary attack which so frequently happens when persons are irritated by passion. Whatever pain or inconvenience is wilfully or unlawfully inflicted upon the person of an individual by the act or agency of the defendant, is an assault. . . . Thus, if one administer a mischievous drug to his neighbour, thereby causing him a certain amount of suffering, the act, . . although no blow be struck, . . . is very clearly an assault at Common Law." The author, according to a reference made at the bottom of page 177, alludes to the case of *R.* v. *Button* (*o*), determined at the Central Criminal Court, in 1838, by the Recorder of London (Law) and Mr. Sergt. Aratin, on which, by giving Mr. Woolrych's argument a somewhat different form, an American Criminalist of high standing, Mr. Bishop (*p*), comments in these words:—"On principle, where, under the circumstances mentioned in *this case*, the intent and the act are sufficiently evil in degree for the criminal law to notice, . . . no good reason appears why the offence should not be deemed an assault, and also a battery."

To this it may be added, as a second argument, that though the prosecutors in the case of the Spanish flies above narrated, made no resistance, and even expressed no repugnance, it cannot be inferred therefrom that they consented. In order to consent to, or dissent from a proposed action, which, in this case, is that of drinking the mixture, the will must be active; and how can the will be induced to act, if the person is ignorant of the nature of the action? Therefore, as it is impossible to say that the prosecutors have consented to drink ale mixed with Spanish flies, it necessarily follows that the fraud practised on them by prisoners, is equivalent to force.

(*o*) 8 C. & P. 660.
(*p*) Criminal Law, vol. 2, p. 18, sec. 28, n. 3.

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But it is conceived that these objections may be answered by the simple consideration, that the use of force is the foundation of the crime of assault, as it is clearly enunciated in the definition of it already given, and which alone can be evolved from the English as well as the American jurisprudence. Then, Mr. Woolrych's "whatever pain or inconvenience . . . inflicted . . . by the act or agency of the defendant, . . ." cannot be thought of for a moment. As to Mr. Bishop, he might have said of *R.* v. *Button*, if the intent had been malicious, that no good reason appears why the offence should not be deemed an attempt to murder, instead of an assault, for the act of prisoner, as related in the report of the case, being the putting cantharides into coffee, the prosecutrix taking the coffee without prisoner's help, was, if coupled with an evil intention, sufficiently proximate to death to warrant such a finding; but the prisoner made no motion towards putting the poisonous potion to the lips of prosecutrix, and using no force, committed no assault. The act of taking the poison is the only one under consideration as implying a transaction susceptible of being stamped with the character of assault, between prisoner and prosecutrix. It was the act of prosecutrix, not of prisoner. This also answers the second objection to the proposition, against which the case of *R.* v. *Button* is the only precedent.

But this case may be considered as unquestionably overruled, and for ever rejected from the domain of jurisprudence. Only four years afterwards, (in 1842) Mr. Justice Maule said in *Edsall* v. *Russell* (*q*), which was instituted in the Common Pleas, that, "administering poison does not, of itself, amount to an assault;" and this was not contradicted by any of the Judges who sat with him, and who were, Tindal, C.J., Coltman and Erskine, J.J. On the contrary, Mr. Justice Coltman held likewise in *R.* v. *Dilworth* (*r*), in 1848; Lord Chief Justice

(*q*) 6. Jur. 996.
(*r*) 2 Moo. & R. 531.

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Tindal, consulted by Baron Parke, in *R.* v. *Draper*, in the same year, gave his opinion to the same effect; with which the learned Baron agreed. And Baron Parke repeated his ruling in *R.* v. *Walkden* (*s*), in 1845; and Mr. Justice Cresswell, another Judge of the Common Pleas, (who, however, for some reason or other, did not hear *Edsall* v. *Russell*,) being asked a conference by Mr. Justice Vaughan Williams, in *R.* v. *Hanson* (*l*), in 1849, concurred with his learned brethren, and his advice was followed.

This doctrine was again admitted by Lord Chief Justice S. Jervis, (*u*), Barons Parke (*v*), and Alderson (*w*), and Mr. Justice Patteson, (*x*), in the course of their very learned judgments in the Birds' case, and without eliciting the slightest objection on the part of any of the whole body of the judges of England.

The cases of *R.* v. *Dingman, et al.*, (*y*) and *R.* v. *Smith* (*z*), were both determined by the Court of Queen's Bench of Ontario, the former in 1863, and the latter in 1874; and the case of *R.* v. *Ryan* (*a*), determined by the Supreme Court of New Brunswick, when presided over by the present Chief Justice of Canada (The Hon. William J. Ritchie), may be ranked with the above.

It was, however, most strongly asserted by a very eminent Judge, in *R.* v. *Dugal* (*b*), in 1878, that an assault is a necessary ingredient in murder and manslaughter, though it need not be real, but merely con-

(*s*) 1 Cox 282.
(*t*) 4 Cox 138.
(*u*) 2 Den. 210.
(*v*) Id. 202.
(*w*) Id. 190.
(*x*) Id. 183.
(*y*) 22 U. C. R. 283.
(*z*) 34 U. C. R. 552.
(*a*) 1 Hanney 116.
(*b*) 4 Q. L. R. 361.

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structive. But, may it be said with the greatest respect for such an authority, whatever imaginary lines the mind can perceive between the different periods of a case of administering poison, which it construes into an assault, so long as this operation remains without the definition of assault known to the law, the law will not, of course, take notice of it, and it has, therefore, no legal bearing.

Contending, therefore, that administering poison does not necessarily involve an assault, that if death ensue it is, according to the nature of the intent, murder or manslaughter, and consequently that both species of felonious homicide do not include in their essence an assault, it naturally follows from the rule requiring the verdict to be derived from the charge, that assault cannot be found on an indictment for murder or manslaughter. But, it is deemed better not to determine the question in so absolute a manner, and to proceed further in its examination.

And first, let us consider the question with regard to the concise forms of indictments, which are those ordinarily resorted to, and which were introduced into the law of England by the very Act (*c*) that repealed the enactment on verdict of assault in cases of felony. They are thus described by our Statute, (32, 33 Vict., cap. 20, sec. 6) :—

"In any indictment for murder or manslaughter, . . . it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, of his malice aforethought, kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased . . . (*d*).

As to these forms, the question is manifestly beyond the shadow of doubt. They simply describe the crimes of

(*c*) 14 & 15 Vict. cap. 100, ss. 4 and 10.

(*d*) The Statutes anterior to this one, were 18 Vict. cap. 92, sec. 6, and C. S. C. cap. 99, s. 23.

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murder and manslaughter, and therefore do not bear a finding of assault. *R.* v. *Dingman*, already mentioned, where no felony (manslaughter) was committed, but the transaction amounted only to an assault, is exactly in point.

But an objection has been made out of an insertion in the Statute now in force on verdict of assault in cases of felony, of the additional words, "although an assault be not charged in terms." It has, indeed, been said in *R.* v. *Ganes*, (*e*) in 1872, by Chief Justice Hagarty, though without the concurrence of his colleagues, that these words "in substance, place the concise form of indictment for murder or manslaughter on the same footing as if the death were charged by means of a personal assault." And it has been said by Mr. Justice H. E. Taschereau, in the 2nd vol. of his work on the Criminal Statute Law of Canada, pp. 280, 281, that they render the ruling in *R.* v. *Dingman*, "now inapplicable, if it was ever correct."

Bearing in mind, however, that the Judges of England have suggested in *R.* v. *Birch* "that it would be *prudent* that all indictments for felony, including an assault, should state the assault in the indictment," we may say with Chief Justice Richards, in *R.* v. *Smith*, "The words added in our Statute . . . . . may be considered as a legislative declaration that it was not *necessary* in such cases to charge an assault, and therefore that it does not necessarily change the proper construction of the section from what it was before the amendment, as to the *necessity* of charging an assault in terms, when the crime charged in the indictment does not necessarily include an assault." And so did the full Court of Queen's Bench of Ontario decide in that case, where, on a Case Reserved, they affirmed a conviction of assault, against a plea of *autrefois acquit* to a former indictment for murder in the concise form.

(*e*) 22 C. P. 185.

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Thus far, the state of the main question seems to be satisfactory. But now, the case of an indictment for murder or manslaughter in the old form, describing the crime as having been perpetrated by way of assault, presents an incident easy, like the preceding one, to be decided on principle, but somewhat embarrassing in consideration of the weight of authority which interposes. Indeed, the very illustrious jurists, Jervis, Parke, Alderson, who have accepted the doctrine, that murder and manslaughter do not necessarily include an assault, emphatically declare, on the other hand, that murder and manslaughter by *violence* are, as to that point, quite within the operation of the Statute. Notwithstanding, however, the authority of those great names, it is humbly contended that murder and manslaughter by *violence* are not known to the Common Law, nor to the Statute Law of England or of Canada, as species of felonious homicide, as particular crimes, which alone the Statute contemplates.

"The killing," says Blackstone (*f*) "may be by poisoning, *striking*, starving, drowning, and a thousand other forms of death by which human nature may be overcome." Violence, therefore, being one of the many means of committing felonious homicide, is but an accident, and not an essential element, of either murder or manslaughter. Thus is, under the first part of the rule laid down in *R.* v. *Birch*, the condition of indictments in the old form, assimilated to that of indictments in the new one. No indictment for murder or manslaughter in any form whatever, can support, in this respect, a verdict of guilty of assault.

[*To be concluded.*]

W. A. POLETTE.

(*f*) 4 *Stephen Com. on the Laws of England* 3rd edit. 140.

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INTEREST AS DAMAGES—A RULE OF EVIDENCE.

We call attention to the case of *Simonton* v. *Graham*, (*postea*) (*a*), not because it establishes any thing new in doctrine, but because (i.) it points out a rule of evidence to be observed in such cases, and (ii.) it suggests the more important question, whether the whole subject debated in *Dalby* v. *Humphrey*, 37 U. C. R. 514, may not some day be opened up and decided upon the basis of our Statute respecting interest if the *ratio decidendi* of that case be not, in fact, the Statute.

Touching the first question, with all respect for the learned Judge's ruling, we think the result unsatisfactory. The best expression of the general rule may be found in Lord Selborne's judgment in *Cook* v. *Fowler*, L. R. 7 H. L. at p. 37. "The rate of interest to which the parties have agreed during the term of their contract may well be adopted in an ordinary case of this kind by a Court or Jury, as a proper measure of damages for the subsequent delay; but that is because, ordinarily, a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration of the loan, had been agreed to. But in the case before your Lordships the agreed rate of interest [5 per cent a month] is excessive and extraordinary; and although no question is raised between the present parties as to its fairness or reasonableness, so far as it was a matter of express contract, it by no means follows that it would have been fair and reasonable, or would have been so regarded by the borrower, if it had been indefinitely extended to every possible delay of payment after the stipulated time." Upon these principles *Dalby* v. *Humphrey* was decided. Now, it will be observed that the passage quoted from *Cook* v. *Fowler* does not warrant the assertion of the broad principle which should govern all like cases that the rate of interest fixed by the parties to the contract is *prima facie*

(*a*) Chancery Chambers, Occasional Notes.

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to govern in the absence of evidence contra. The reasoning of Lord Selborne may be paraphrased as follows:—"The rate in the contract, *if reasonable*, may well be adopted as the measure of damages. In this case the rate is so excessive as to shock the conscience. Therefore, this contract does not furnish the measure of damages. But what rate shall we allow? What is 'ordinarily reasonable?'" So in each case this is the question to be answered—and it is the rate and its reasonableness, and not the contract, that are the evidence of the damages to be assessed. And thereupon arise several considerations. Where fifteen per cent. per annum might be considered unreasonable, at what particular point between that rate and ten per cent. (the rate in the principal case) is the unreasonableness to cease and the reasonableness to commence, so as to induce the Master to call upon the covenantor to give evidence to reduce the amount. Or in other words, in a trial at Nisi Prius, where the plaintiff seeks damages for the detention of his debt, at what particular stage of the case, or upon the arising of what particular circumstances is the defendant to know whether or not the Judge will direct the jury that the contract rate is reasonable, and to allow it, or unreasonable, and to assess what is reasonable. And if the Judge should consider the contract rate unreasonable, either on account of its being too high or too low, and should call for evidence as to what would be reasonable he must exercise *his* discretion as to the measure of damages.

So it appears that in following this rule of evidence, the Master must first deliberate as to the reasonableness of the rate fixed by the contract, before proceeding to assess the damages. And what guide is he to have as to what is reasonable until he has evidence before him of the correct or reasonable rate. For the only rate reasonable to be allowed is the then market value of money. And this current rate may be reasonable with regard to our statutory rate, or very unreasonable with regard to it. So there is, in reality, no guide for the Master until the

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current rate is ascertained by evidence. For the claimant to submit his contract to the Master, leaving it to his discretion to accept the rate as reasonable, is to found a case for damages upon judicial discretion, and not upon evidence; and judicial discretion may be as fluctuating as the rate of interest. And, *per contra*, if the submitted contract be considered unreasonable in its terms, the Master must either call for evidence from the claimant and not from his opponent, in contravention of this rule of evidence, or else he must go outside the contract and exercise an arbitrary discretion as to the rate to be charged.

In the principal case, it appears that the Master thought ten per cent. per annum, unreasonable; that the plaintiff thereupon offered no evidence as to the rate; and that the Master accordingly assessed the damages at the rate of six per cent. There was no necessity, consequently, for the subsequent incumbrancer to offer evidence in reduction of the rate, when the Master already thought ten per cent. unreasonable, and the plaintiff gave no evidence whatever. On an appeal from one discretion to another, then, the rate appears reasonable, until the current rate of money is shown, and then it lies upon the party opposing the assessment of damages, to furnish the rate at which they should be assessed, instead of upon the party seeking them.

In the case before us there is nothing so exorbitant in the rate of ten per cent. per annum as to shock the conscience, nor is it to use Lord Selborne's words, that "reasonable and usual rate which it might be presumed would have been the same whatever might be the duration of the loan." Is the rate then to be allowed for its negative qualities, which do not shock the conscience, or should it be allowed for the positive reason that the plaintiff could have got that rate for his money if it had been paid when due? Again, the rule laid down implies the proposition that the contract rate is reasonable until, and *only* until, the covenantor shows that the current rate was a less one at maturity of the contract. This sub-proposition becomes

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in fact, the principal one, because the final determination of what the "reasonable" measure of damages should be, will be the allowance of the current rate on proof adduced thereof by the covenantor, which will, in every case, be done where it is less than the contract rate.

We may, however, suppose the absence of the covenantor at the taking of the account. Suppose the current rate to be six per cent. per annum; the contract rate, sixty per cent. per annum; suppose the Master to disallow the latter rate as shocking to the conscience. What is he to do upon the refusal or neglect of the plaintiff, as in the principal case, to offer evidence? But, suppose him to take evidence, and finally, to assess six per cent., the current rate, as the just measure of damages. This would accord with reason and justice. But suppose the contract rate to be only ten per cent. per annum, and suppose the Master to consider this rate reasonable, and to assess the damages thereat, in the absence of the defendant. Is there any more reason for over-charging the latter four per cent. per annum than there is for over-charging him fifty-four per cent. per annum?

It will be answered that the defendant may avoid this by attending before the Master. But we humbly submit that the rules of evidence should not be subject to such a possible variation; and that an absent defendant should not be subject to the consequences of such variations.

But apply this rule to the case where money has not fallen, but risen. Suppose money to be loaned to-day for three years, at six per cent. Or suppose an exceptional case of a loan at four per cent. At the end of three years the current rate is ten per cent. It is to the interest of the mortgagor to keep the loan existing rather than to borrow at the current rate to pay it off. How is the plaintiff to proceed? Beyond question, the contract rate will not shock the conscience. It is, in fact, most reasonable. Is the Master therefore to assess the damages at this reasonable rate until the defendant objects? Or is the *onus* in this

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case to be shifted to the plaintiff's shoulders? Plainly, he should not get more unless he proves himself entitled to more. Yet, justice requires that he should get the correct rate. We can deduce from the case nothing applicable, except that the Master should proceed to compute the interest at the contract rate, if it be not unreasonable. Here the most rational way of proceeding, and the only way in which we can imagine the proceedings to take place, would be for the plaintiff to begin at once and show what was the current rate at maturity of the contract. And here a new element is introduced. The discretion of the Master as to the reasonableness of the rate will be not not only subject to review on appeal, but will be subject to the approval of the plaintiff. If the Master should think the rate reasonable, and the plaintiff should think it too low, the *onus* would be on the plaintiff to increase it if he could. If the Master should think it reasonable and the defendant should think it too high, the *onus* should be on the latter to reduce it—as in the principal case. If the Master should think the rate unreasonable, who is to begin?

The true and undisputed principle upon which the cases proceed, is, that if the money were paid when due, it could be invested at current rates; not being paid, damages should be allowed for its detention. But, in the application of this principle, according to the rule discussed, we have seen that complications arise, and the *onus* shifts from one to another, according to the discretion of the Master, and not according to the issue to be tried. In either case, the ultimate result is the assessing of the damages at the current rate, which is the just measure of damages. The object to be attained by the plaintiff, and the end which the Courts will assist him in attaining, is the recovery of the same rate as he would have been able to re-invest his money at, if it had been paid when due, presumably the current rate. And the most rational method of arriving at this end, is to call upon the plaintiff invariably to show what is the current rate—the rate at which his damages should be assessed.

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We may here note two important *dicta* bearing on this branch of the subject. Sir George Jessel, M. R., in *Re Roberts*, L. R. 14 Chy. Div. 49, during the argument said, "I know of no authority which says that more than five per cent. will be given by way of damages." And this, because that rate, as afterwards explained, is the usual commercial value of money beyond which a jury cannot go under the Statute (*infra*). The other *dictum* is that of Lord Chelmsford, in *Cook* v. *Fowler*, at p. 55 of the Report. "There is no authority that I can find to support the argument of the counsel for the appellant, that, when a security for money payable at a certain day, stipulates for the allowance of a certain rate of interest up to the day fixed for payment, interest at the same rate is implied to be payable afterwards."

Secondly, the subject may be considered from another point of view, viz., as affected by Statute. No decision of ours, as far as we can learn, proceeds expressly upon the law as enacted by our Interest Act, unless *Dalby* v. *Humphrey* can be brought within its purview. It was therein expressly decided "on the principles laid down in the case referred to in the House of Lords (*Cook* v. *Fowler*) that the plaintiff should not recover, as damages, more than at the rate of six per cent. per annum, from 1st October, 1865, the time the note became due." In other words, no more than a certain rate should be allowed here, because no more than a certain rate was allowed in England. The questions naturally arise, what are the principles laid down in *Cook* v. *Fowler*? And why was the particular rate of six per cent. allowed in accordance therewith? Do the principles laid down in *Cook* v. *Fowler* only furnish a rule whereby the proper rate may be discovered in each case, or do they establish that a certain rate is fixed by law, and that it is applicable to every case?

There is this similarity between the two cases, that the rate allowed in each, is the usual rate allowed by the Courts without evidence, where none is expressed by the

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parties in their contract, or is otherwise payable. But there is this apparent difference, that, whereas from the passages from *Cook* v. *Fowler* cited in *Dalby* v. *Humphrey*, one would be led to suppose that the commercial rate of interest was that proper to be allowed, the rate which ultimately was allowed in the latter case was plainly not the current rate, but our statutory rate. Ascertaining and keeping in view the principles laid down in *Cook* v. *Fowler*, we think it will appear reasonably doubtful that the *ratio decidendi* of *Dalby* v. *Humphrey*, was any other than our statutory law respecting interest, brought into play as soon as it appeared clear that the contract did not fix the rate after its maturity.

The words of the English Act (3 & 4 Wm. IV., cap. 42, sec. 28) allowing interest to be assessed as damages are as follows:—"Upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, etc." From this it appears that while the jury are bound not to go beyond the current rate they are at liberty to assess what rate they think fit or not to assess anything unless "they shall think fit." And the primary Judge in *Cook* v. *Fowler*, appears also to have exercised his discretion as to the rate. At page 32 of the report the Lord Chancellor (Lord Cairns) distinguishes between cases coming under 1 & 2 Vict., cap. 110, sec. 17, which fixes the rate of interest on judgments at four per cent., and cases of this kind. He says:—"It appears to me that in the first view the rate of four per cent. is the rate absolutely assigned by statute upon the payment of judgment debts; and in the second case it is for the tribunal to fix the rate of damages. It is possible that the rate of five per cent. might be given by a jury or by a Judge who was performing the functions of a jury; but the primary Judge having in this case only given the *usual rate assigned in the Court of Chancery*, namely, four per cent., I certainly do not propose to advise your Lordships

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to disagree with that opinion at which he has arrived, but on the contrary, I advise and move your Lordships that this appeal should be dismissed with costs."

From these words we deduce, that the Judge of first instance acted upon his discretion in allowing the rate of interest fixed by the invariable practice of the Court of Chancery, and that, though possibly a higher rate *might* have been allowed, that did not form ground for allowing the appeal. As a corollary to this case, we venture to enunciate that, if the Judge of first instance had heard evidence that the current rate was greater than four per cent., and yet had allowed but four per cent., his decision would not have been interfered with on appeal. In other words, that a Judge, acting as a jury, or a jury, is not bound to allow the current rate of interest. The case may also be cited for this proposition, viz., that it has been the invariable practice of the Court of Chancery to allow four per cent. when the rate is not otherwise fixed; that the Judge, in this instance, followed the practice so established, and that the House of Lords has approved of it.

If, then, our deductions are correctly drawn, the result of the case may be thus summed up:—"Where the contract does not fix the rate of interest to be charged after maturity, the Court will allow that rate which has been established by law—or by the invariable practice or domestic law of the Courts."

If this be the true principle of the case, then *Dalby* v. *Humphrey* proceeds upon the same principle. Because, says Richards, C. J., the plaintiff in *Cook* v. *Fowler* should not recover more than four per cent., therefore, the plaintiff in *Dalby* v. *Humphrey* should not recover more than six per cent As the rate fixed in England is a rate invariably allowed by the Court of Chancery, so the rate fixed in Canada is one fixed by Statute.

The rate in each country is understood as the ordinary or legal rate of interest.

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Upon this principle *Dalby* v. *Humphrey* may well be supported, though it is not directly expressed to have been decided on account of the words of the Statute. There is no ground expressed in the report of the case upon which it may be upheld, which militates against the provisions of the Statute. For there is nothing to show that six per cent. was the current rate from 1865 to 1874, the period for which interest was computed; and it is fair to suppose that if any evidence had been given, touching the value of money during that period, it would have been referred to in the judgment. If this be so, and we assume that the Statute was disregarded, then we are led to the conclusion that an arbitrary discretion was exercised in fixing the rate to be allowed.

The words of our Act, C. S. C., cap. 59, sec. 8, are :— "Six per cent. per annum shall continue to be the rate of interest in all cases where, by the agreement of the parties, or by law, interest is payable, and no rate has been fixed by the parties or by the law." The three elements required by the Statute were present in *Dalby* v. *Humphrey*. Interest was payable by law; no rate had been fixed by the parties; no rate had been fixed by the law. Six per cent. was therefore payable; and six per cent. was allowed; but whether as a consequence of the Statute or not, the Report sayeth not. The case when regarded in this light agrees with the Statute. If founded (as to the particular rate) upon any other principle it militates against the Statute. Another of the principles of law, touched upon in *Cook* v. *Fowler*, which is apposite to the case in the Queen's Bench, and which could not have escaped the learned Judge who had evidently made a careful study of the House of Lords case, is enunciated by Lord Selborne in the passage already quoted, viz., "the rate of four per cent. is the rate absolutely assigned by Statute upon the payment of judgment debts." The words of the Imperial Act, 1 & 2 Vict., cap. 110, sec. 17, are :—"Every judgment debt shall carry interest at the rate of four pounds per cent. per annum from the time of entering up the judgment . . until

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the same shall be satisfied." . . The words of our Act just as absolutely assign the rate of six per cent. when none is fixed by contract, or otherwise by law. Until, however, *Dalby* v. *Humphrey* receives judicial explanation, or is reviewed by the Court of Appeal, we presume interest as damages must still be computed at the current rate.

THE LATE JUDGE MACDONALD.

The members of the Bar of Guelph, met in the parlours of the Wellington Hotel on Wednesday evening, Donald Guthrie, Q.C., in the chair, and Fred. Biscoe, Secretary.

Resolutions were passed as follows :—

On motion of Messrs. Lemon and Biscoe : Resolved—That the members of the Bar of the County of Wellington have heard with sorrow of the decease of Archibald Macdonald, Esq., late Judge of the County Court of Wellington, who for the period of twenty-four years efficiently performed the onerous duties of that position ; and we desire to record our feelings of deep regret at the great loss not only we, but the public have sustained in his death.

On motion of Messrs. Dunbar and Watt : Resolved—As a mark of our respect for the memory of the late Judge Macdonald, the members of the Bar do attend his funeral in a body, and wear the customary mourning for the period of thirty days.

On motion of Messrs. Hall and Cutten : Resolved—That we tender to the bereaved family of the late Judge Macdonald our heartfelt condolence in this hour of their affliction.

On motion of Messrs. O'Connor and McMillan : Resolved —That a copy of the foregoing resolutions be transmitted by the Secretary, to the family of the late Judge.

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EDITORIAL REVIEW.

Interlocutory Costs.

The *Irish Law Times*, 12th March, 1881, takes from the *Times* a letter by Lord Justice Bramwell, over the signature "B.," touching the question of costs, which appears to be convulsing the profession in England and Ireland. A generous desire to relieve the suffering litigant public from the burden of costs which is at present imposed upon it, is giving birth to multitudinous schemes for producing cheap law. In the letter referred to, among other suggestions not so good, we read:—"Further, whether this plan is adopted or not, I would have interlocutory costs paid down. A solicitor is busy, and wants an extension of time. He gets an order almost as a matter of course. The costs fall on the ultimately losing party. If the solicitor had to pay down 10s or 20s, as the costs of his convenience, he would have managed to do without it." We sincerely hope that under our new practice some such rule will be adopted. Many a doubtful and fishing motion would not be made if the mover were aware that the result of his failure would be to cause the immediate disbursement of the costs of the application. Again, the plaintiff's attorney makes an error in his proceedings, which cannot be overlooked. The defendant's attorney moves to set them aside for irregularity, or to compel him to amend. On the return of the summons the plaintiff submits to amend, and the defendant's costs are *fixed* at a sum about equal to the disbursements, if an agency matter, and are ordered to be paid to him in the event of his succeeding, or allowed as a set-off, on the final taxation in the cause. So the plaintiff, who has committed an error, gets his proceedings amended practically at the expense of the defendant, unless the latter eventually succeeds in the cause. Even if the defendant does succeed, he has to wait probably six months or more for his costs, which were fixed

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at about a quarter of what they would have been taxed at. When the costs of an interlocutory motion are ordered to be paid at once it seems not unreasonable to fix them at some reasonable sum less than the taxed costs; but we fail to see why the party who has to wait for months for them should have them docked as well. It may be argued that this would encourage speculative motions; but costs are discretionary with the Judge, and he could refuse them if he saw that the practice was being abused. A letter to the opposite party, pointing out the irregularity, and requiring him to amend should be a sufficient ground, on refusal, to ask for, and obtain, the costs of a motion to compel amendment.

The Lat Election of Benchers.

We give in another place the names of the newly elected Benchers. The *personnel* of the Bench has not greatly changed. The most noticeable change is the election of the four representatives of the views of the Junior Bar, which may be looked upon as a distinct expression of opinion by the profession upon the policy which the Juniors advocated as the duty of the Bench to adopt. How this may, or can be responded to, remains to be seen.

To the Southern Law Review.

We have no fault to find with this excellent Magazine, from which we derive much pleasurable profit; and we hope that our contemporary has no fault to find with us. We presume that it is by an oversight that it gives credit to the *Weekly Jurist* for an article entitled, "Does the power to sell imply a power to mortgage?" which the latter periodical copied from our pages, giving credit therefor.

An Apology for our Name.

The *Chicago Legal News* refers to this Journal as the *Canada Law Journal*. While we appreciate the compliment, we feel constrained to say, that a separate and distinct individuality necessitates adherence to our chosen and distinctive appellation.

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Law Society of Montreal.

"The Law Society was harmoniously constituted on Saturday, the 19th instant, and the constitution received at once the signatures of sixty-two members of the Montreal Bar who were present. Dinners monthly and other meetings weekly are part of the programme. A learned Counsel is the authority for the statement that the Political Economy Club were dined (but not wined) at one dollar per head, and he anticipated that the Bar might be catered for on the same terms. Some *gourmands* may be inclined to consider this a dolorous prospect.

"The Law Society, on the 26th March, proceeded to the election of office bearers, which resulted as follows :—President, the *Batonnier*; Vice-President, T. W. Ritchie; Treasurer, S. Pagnuelo; Secretary, F. L. Beique; Committee, Hon. R. Laflamme, J. A. Loranger, J. J. Curran, C. P. Davidson, C. A. Geoffrion.—*Legal News.*

We are not informed of the main objects of the Society; but a prominent place is given to dinners, whether with the view of reviving the ancient practice of eating one's way to the Bar, or not, is left unsaid. We believe that there already exists a Bar Society in the district.

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NOTES OF RECENT DECISIONS.

McMaster v. *Garland*, 31 C. P. 320 ; 1 C. L. T. Occ. N. 62. In our regular February and March numbers we published two articles upon chattel mortgages where the term of credit exceeds a year. The views there taken make an inroad upon the Statute affecting these instruments, which, if sustained by the Courts, will be practically destructive of the whole Act. This case suggests a further inroad upon the same Act. There was but *one* delivery of goods followed by a continued change of possession, and several charges made upon them, not all of them accompanying the delivery. The head-note of the case, as far as it relates to the branch of the case upon which we touch, is as follows :—"Where possession is changed it need not be given personally to the creditor, purchaser or mortgagee; it may equally be given to a trustee or bailee for him; and the debtor may increase the claim of such bailee, or *may charge the goods with further sums in favour of other persons.*" The italicized words are those which seem to nullify the Statute. Wilson, C. J., at p. 330, says, "In my opinion, if the debtor and bailor could increase the claim of S. & Co., (the bailees) upon the goods by getting further advances from them, or by letting in specifically any other general claim which they had against him, (and I see no reason why he could not do that), so he could in like manner charge these goods with further sums in favour of *other* persons, and when the holder of the goods accepted or had notice of such further charges, he would be bound to hold the goods as subject in law to these new demands." Where one delivery is made for the purpose of satisfying all charges due at the time of delivery, the Statute plainly is complied with. But is not the Statute by the same delivery exhausted? Suppose a new order to be given to a stranger upon the goods after they have been delivered, which was not contemplated at the time of delivery; this

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would be a new sale or a new mortgage or charge, as the case may be; and we should have thought, but for this decision, that it required either a new delivery or registration of the charge, in order to comply with the Statute. The words of the Act, (R. S. O., cap. 119) are, (sec. 1), "Every mortgage or conveyance intended to operate as a mortgage * * which is not *accompanied* by an immediate delivery, and an actual and continued change of possession, etc.," and (sec. 5), "every sale * * not *accompanied* by an immediate delivery and *followed* by an actual and continued change of possession, etc." Now, it will be noticed that the delivery of the goods, which is said to support the new charge upon them, did not *accompany* the order, but was an antecedent delivery in no way connected with it; it was not an *immediate* delivery, but a remote one; it was neither *accompanied* nor *followed* by an actual and continued change of possession; for the possession before, at the time of, and after, giving the order remained the same. The bailee holds the goods to pay the claims which he took them charged with. He holds them for the bailors as to the surplus. Upon a new order being given and accepted, he holds them without change of possession for the equitable assignee. It is difficult to reconcile this with the general policy of the Act which is thus expressed by the learned Chief Justice:—"If, then, the right of property is separated from the possession, the right of property will not be regarded as against creditors, etc., unless it be protected and preserved by registration. That being the object and policy of the Statute, it has expressly excluded from its operation all mortgages or sales by which the possession goes along with the goods to the transferee." The possession here does not "go along with the goods to the transferee," but remains with the bailor's agent, who, in obedience to his principal, converts himself into a trustee for a third person, by accepting the order. It will be observed that the words "change of possession" are used by the Legislature in an apparently unlimited sense. The change is not restricted by the meaning of the words used to a parting with the possession by the original

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owner. The policy of the Act seems to be that the badge of ownership shall be either actual possession or a registered instrument, the transferee or mortgagee obtaining either so as to protect himself. In this case the mortgagee had neither. So it appears, that notwithstanding the policy of the Act, secret conveyances may still be made.

Steinhoff v. *The Merchants' Bank*, 1 C. L. T., Occ. N., 269. With regard to this case and the principles which come into play in like cases, see an article in the *Central Law Journal* of 18th February, 1881, reviewed at pages 246 and 247 of our regular April number.

Clarke v. *Creighton*, 45 U. C. R. 514; *Griffin* v *Patterson*, *Ibid.*, 536. The exhaustive judgment of Mr. Justice Armour in the former case forms a valuable contribution to the law on the much vexed subject of the liability of married women. We hope to be able to give our readers a review of the law which affects, or perhaps we should say, which fails to affect, married women under our Acts relating to them, before long.

NEW SUPREME COURT ORDER.

The following order has been made with regard to entering appeals in the Supreme Court of Canada:—

"1. That rule 11 be made and the same is hereby amended by striking out the word 'immediately' at the beginning of such rule.

"2. That rule 14 be and the same is hereby amended by striking out the words 'one month' therein contained, and by inserting in lieu thereof the words 'fifteen days.'

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"3. That rule 15 be and the same is hereby amended by inserting after the words 'and mailing,' where they occur in such rule, the words 'on the same day,' and by striking out the words 'in sufficient time to reach him in due course of mail before the time required for service.'

"4. That rule 23 be and the same is hereby amended by striking out the words 'one month' at the beginning of said rule, and by inserting in lieu thereof the words 'fifteen days.'

"5. That rule 31 be and the same is hereby amended by striking out the words 'one month' where they occur in said rule, and by inserting in lieu thereof the words 'fourteen days,' and by adding at the end of said rule the words 'but no appeal shall be so inscribed which shall not have been filed twenty clear days before said first day of said session without the leave of the Court or a Judge.'

"6. That rule 62 be and the same is hereby amended by striking out the words 'one month,' and by inserting in lieu thereof the words 'fifteen days.'

"7. That rule 63 be and the same is hereby amended by striking out the words 'two weeks,' where they occur in said rule, and by inserting in lieu thereof the words 'one week.'"

Signed..... { "W. J. RITCHIE, C. J.
"S. H. STRONG, J.
"T. FOURNIER, J.
"W. A. HENRY, J.
"JOHN W. GWYNNE, J."

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BOOK REVIEWS.

A Treatise on the Law of Choses in Action. By J. JAMES KEHOE, of Osgoode Hall, Barrister-at-Law. Toronto: Carswell & Co., 1881.

Canadian legal authorship is asserting its individuality, and it is gratifying to find that there are men among us who are ready to devote their time and labour to the elucidation of principles which, from the increasing needs of society, are acquiring greater significance.

The author does not attempt an exhaustive treatise, as the variety of subjects over which the law extends is enormous; but warns us in his preface, that the book is but a manual. Opening with a short introductory sketch illustrative of the early doctrines touching Choses in Action, and noticing the changes effected by several Statutes, he divides his work into eleven chapters. The most important of the heads so treated, are Equitable Assignments, Assignments at Common Law and under the Statute of Ontario, Transfer of Bills of Lading, Right of Surety to security on payment of debt and Choses in Action of married women. It is to be regretted that, in the chapter on Particular Assignments, the author has not dealt with the law governing the assignment of administration bonds, which is an important branch of this subject, and one which has given rise to some litigation productive of some nice points. The work will be found a useful guide to a closer research into any of the particular branches affected by the law of Choses in Action, for the assiduous author has collected numerous cases in support of his text.

We feel constrained to mention that some awkwardness of expression has crept into the text. In writing upon scientific subjects a thorough mastery of language is essential to place a book beyond criticism in this respect. Still

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it is an admitted fact that the art of composition is a rare acomplishment. Many learned lawyers are wanting in this respect; and some of our standard works contain passages not remarkable for chastened and correct phraseology. In discussing the much tried cases of *Erb* v. *G. W. R. Co.* and *Oliver* v. *G. W. R. Co.*, a comical effect is produced, which is plainly the result of rapid composition. It is said, "The cases which mostly agree in principle with the majority of Judges in the latter cases are, etc." There was a wide difference of opinion in the cases under review and no doubt the learned author means that the disagreement of some of the cases with the minority of the Judges, was the cause of their having passed such voluminous opinions upon the points at issue.

We close the book pleased at this latest attempt at authorship.

A Treatise on the Liability of Stockholders in Corporations. By SEYMOUR D. THOMPSON. St. Louis: F. H. Thomas & Co., 1879.

Industry and the name of Judge Thompson seem to be inseparably connected. The subject of this work, treated as it has heretofore been in a chapter or two of works on the law of corporations generally, and the size to which the essay, (as its author calls it) has attained, are sufficient to suggest this. Even a limited perusal of the work confirms it.

We may well give an idea of the scope of the treatise by referring to the scheme adopted. It is divided into four parts. Part I. treats of the nature and extent of the liability of stockholders. The second part is devoted to the manner in which this liability is incurred. The manner in which this liability is divested is discussed in the third part, and the fourth part is devoted to remedies, procedure and defences.

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The liability of stockholders being largely dependent upon the effect of statutes, the author has discussed in detail their liability under particular statutes, and has reviewed the conflicting views that have been entertained concerning the construction of such statutes. The learned writer points out what he conceives to be a distinction to be observed in the construction of American statutes by comparison with the "strict construction" placed upon some English Acts. He says, "If it [strict construction] means that Courts are at liberty in any case to refuse to give full effect to the intention of the Legislature, where that intention is plain, or even where it is probable, for no other reason than that the statute invades the Common Law, then it is manifestly a rule which has no place in the American system of jurisprudence. * * The powers of the different departments of the American state governments are strictly defined and separated by written constitutions; and no power of this nature has been committed to the judiciary. In England, where the Parliament was theoretically supreme, and where it was, hence, beyond the power of the judicial Courts, to declare an Act of Parliament void, this rule afforded, perhaps, the only means which the Courts possessed of checking rash and hasty invasions of the judge-made law. * * In fact, the rule in this country seems gradually falling into disuse, and it may safely be affirmed that, where a statute is not inhibited by the written constitution, nor a palpable invasion of common right, the Courts will always so construe it as to give full effect to the intention of the Legislature."

A like or more marked distinction obtains with reference to the different theories which obtain with respect to corporations in the two countries; and this distinction has been observed in examining the cases. For instance, it is said at § 10 "that the capital stock, and other property of a corporation, is to be deemed a trust fund for the payment of the debts of the corporation; so that the creditors have a lien or right of priority of payment on it, in preference to

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any of the stockholders of the corporation." The doctrine is attributed to Mr. Justice Story, and is said to be peculiar to the American Courts. How far it may be carried, or what may be its consequences if indefinitely extended, is not shown.

Another more practical distinction may be noticed with regard to insolvent corporations. The English doctrine is said to be "that, upon the winding up of a company, the rights of the creditors can only be enforced through the official liquidator against the shareholders, *in the right of the company.* It results, that where the members of the company, in organizing it, agreed that the shares were to be deemed paid, or paid to a given extent, and the company was so registered, the official liquidator will not be permitted to show that the shares were not paid as so represented, for the purpose of charging the shareholders as contributories." The doctrine is a disastrous one for creditors; and is repudiated *in toto* by the American Courts, which hold that a receiver or assignee represents creditors, and can assert against the shareholders any right which the creditors could assert if proceeding directly against them. Our readers will recognize the kinship of this doctrine, to that affecting the rights of creditors through the instrumentality of the assignee under our Insolvent Act, which is embalmed in *Re Andrews*, 4 App. R. 24, and *Re Barrett*, 5 App. R. 206. It is, however, not wholly foreign to English law, as may be seen by reference to *Re Andrews*.

These examples are sufficient to show the exhaustive method which has been pursued in analyzing the subject, which, we may add, has been discussed in every branch upon principle supported by numerous cases. The author, in examining principles of law, has set an example, which, if followed, will do something towards raising the art of text-writing above that of compiling digests, which is too often the sole aim of a text-writer.

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A report of the case of the Queen v. *McLean, et al.* Edited from the notes of the Judges, by the Hon. Henry P. Pellew Crease, one of the Judges of the Superior Court of British Columbia. Victoria, B. C.: McMillan & Son, 1880.

This volume gives a full report of the trial of the prisoners for what was commonly known as the Kamloops murder. The facts are shortly stated in the preface. The prisoners were tried, found guilty and sentenced to death. But the Dominion Government ordered an argument of the case before the full Court, to determine the validity of the trial and sentence. The question for decision was, whether a Court summoned and sitting without commision of oyer and terminer, etc., could legally try and sentence persons accused of capital offences. In the opinion of the Court, the proceedings were null and void.

The case, says Mr. Justice Crease, at p. 22, "is fraught with momentous issues, for, on the power of the Lieutenant Governor to grant commissions of oyer and terminer and general gaol delivery, may possibly depend not only the validity of every other trial and sentence at the late New Westminster Assize, but of every trial and sentence passed for every crime, from murder downwards, which has been had, for several years subsequent to Confederation, throughout British Columbia."

The learned Judge has displayed great industry in the the preparation of the report, which, in an appendix, includes the correspondence between the Judges and the Executive with respect to the questions at issue.

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CORRESPONDENCE.

Mr. Justice Armour on the Married Womens' Act.

To the Editor of the Canadian Law Times:

SIR,—Mr. Justice Armour has no doubt delivered what may be termed "disturbing" judgments in *Clarke* v. *Creighton et al.*, 45 U. C. R. 514, and *Griffin* v. *Patterson*, *Ib.*, 536. I think, however, he is entitled to the thanks of the public in general, for having sought to reopen the question of liability of married women under the Ontario Act of 1872, and to relieve creditors from the anomalous position in which the decisions of our Provincial Courts upon that Act place them. The Vice-Chancellors Blake and Proudfoot, as well as the learned Chief Justice of the C. P., may have shewn signs of restlessness at various times under the yoke of the case law, but it has remained for Mr. Justice Armour to grapple fairly with the difficulty, and to endeavour to drag creditors out of the slough of despond into which they have strayed. His cool irony when discussing the views propounded by the "advocates of the narrow construction" of the Act, although somewhat novel in the literature of the Courts, may have the effect of arousing the attention, not only of jurists, but of legislators to the anomalies to which the decisions of the Courts have given rise. To say that the intention of the Legislature in the Act was what the Courts have interpreted it to be, with reference to the liability of married women, is to come as near saying that the Legislature meant nothing at all as it is possible to come without saying it. It is to be hoped that Mr. Clarke (if the plaintiff in the above suit and the well-known legal author are, as I suppose, one and the same person) will have public spirit enough to carry his case to the Supreme Court, where a new and independent construction of the Act may be given. It is to be presumed, however, that Mr. Justice

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Gwynne at least would adhere to his former construction; and it might be more satisfactory if some clear-headed legal member of the Legislature would take the matter up and carry through an Act which would be incapable of misconstruction. With thanks for the space allotted me in your valuable journal, I remain,

COMMON SENSE.

St. Thomas, March 31st, 1881.

A Correction.

To the Editor of the Canadian Law Times:

DEAR SIR,—On reading the article, "Election of Benchers," promulgated in advance of your April number, I find a mistake in the resolution published as being moved by Mr. Worrell; that is, the words, "or eminence in the profession," which were in the original resolution after the words, "length of practice," have been omitted.

The first amendment moved was that the words, "or eminence in the profession," and also the word, "Junior," where it last occurs in the resolution, should be struck out, and that the words, "best men at the" should be inserted before the word "Bar," where it first occurs.

This amendment was withdrawn in favour of the one moved by Mr. McDonald, which was carried.

The correction should be made in your publication.

Yours, truly,

JAS. R. ROAF.

Toronto, 29th March, 1881.

[The writer of the article referred to was under the impression, that the amendment to the resolution which Mr. Roaf refers to, was accepted by Mr. Worrell, who shaped his resolution accordingly; and it so appeared in the Daily Press. We are, however, glad to be able to make the correction, and only regret that this letter did not come to hand until our April number was so far advanced that it could not be inserted.—ED.]

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REVIEW OF EXCHANGES.

American Law Register.—March, 1881.

Contempt of Court, by CHARLES CHAUNCEY, is continued from the last number. The writer discusses what is not a contempt; and then proceeds to deal with the punishment for contempt.

Ibid.—April, 1881.

Contempt of Court is continued. What Courts possess the power at Common Law to punish contempts; the origin of the power; and its nature and extent at Common Law are the subjects of this number.

The Constitutional Foundation of War Claims for Property, by WILLIAM B. KING. Opening by showing that the exclusive right of private property may be invaded by the right of eminent domain, or by the law of necessity, the writer lays down that war to some extent abrogates the law and the necessity of the hour becomes supreme. "If the owner has any remedy, it must be against the Government. He has certainly suffered loss. Is he without remedy? If he has a remedy, on what principles does it rest? Where must he seek it?" These are the questions considered under the heads of "Suits against the Government" and "The Constitutional Requirements of Compensation for Property taken under necessity." The direct judicial authorities are then reviewed.

Canada Law Journal.—15th March, 1881.

Loss of Buildings by Fire pending Contract of Sale. ANONYMOUS. The learned writer points out the difference in the application of the law to cases where the contract of sale is private, from that in which the sale is under order of the Court of Chancery, the practice of the latter Court requiring the report on sale to be confirmed before the estate can vest in the purchaser, and therefore throwing such a loss upon the vendor An error has crept into the remarks on *Stephenson* v. *Bain*, 8 Pr. R. 258; the stated effect of the case being exactly the opposite of the actual decision. In that case, as we pointed out in reviewing an article on the same subject in the *Central Law Journal* (1 C. L. T. p. 166), Proudfoot, V.C., *held* that the loss, happening before confirmation of the report, did *not* fall upon the purchaser. A cognate case, showing the working of the law in a case where a rise in value of the property happens, is *Hodder* v. *Ruffin*, Tamblyn 341, where it was held that a purchaser having resold with a profit before his purchase was confirmed, the person to whom he has sold is to be considered as a substituted purchaser, and must pay the additional purchase money into Court for the benefit of the parties to the suit. Sir

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John Leach, M.R., at page 343, says: "The Court never confirms an order where the purchaser has made a profit unless he bring the profit he has made into Court. * * If a man makes a contract before the party of whom he purchases has had his purchase confirmed, he becomes a purchaser under the Court. * * Mr. Alston (the purchaser) enters into an agreement to transfer his contract before he had acquired a title under the decree of this Court; this must be for the benefit of the parties in the suit, and not for his own personal profit."

Our law seems therefore to be consistent upon the subject; though it is unsatisfactory that the formalities of the practice of the Court should affect the great rule of Equity, that the estate vests in the purchaser upon his signing the contract. One would suppose that the pratice ordained for carrying the rules of Equity into effect should be subservient to the principl s of Equity themselves—whereas here a great rule of Equity becomes subordinate to the arbitrary practice of the Court.

Ibid.—1st April, 1881.

Division Court Jurisdiction. ANONYMOUS. A few cases, which touch upon the question of whether a claim is ascertained by the signature of the defendant, are reviewed, and the result is thus summed up: "1st. That a suit may be brought under the Division Court Act of 1880, where the instrument plainly sets forth that the sum demanded, which the plaintiff has a right to recover, had been ascertained when the defendant affixed his signature to it, and not otherwise. 2nd. That no other sum can be added by way of damages, or as an accretion, or accessory to the principal. 3rd. That if any such sum is claimed it must be set up in the form used in a Court of Record and can only be used there, and not in a Division Court." With respect to the first proposition we might refer to *The Manufacturers' etc., Ins. Co.* v. *Campbell*, 1 C. L. T. Occ. N. p. 134, where Judge Sinclair held that a claim upon a premium note signed by the defendant upon which $155.96 had been assessed by the directors of the plaintiffs, was not actionable in the Division Court.

On Marriage with a Deceased Wife's Sister, by ALPHEUS TODD. "Marriage with a deceased wife's sister," says the writer, "is as unlawful in Canada as it is in England. But the actual state of the law on this question is not generally known." We believe that among lawyers, at least, the bearing of the laws of Canada upon the subject is not questioned. The distinction drawn by the writer between the statutory law of England making the marriage void *ab initio*, and the law of Canada whereby it is theoretically voidable only, will hardly assist him in establishing his proposition above quoted, though his inspiration is drawn from *Hodgins* v. *McNeil*, 9 Gr. 305, cited by him. We say theoretically voidable; for the marriage is not void, nor is it practically voidable, there being no forum in Canada in which it can be called in question. The conclusion that such a marriage is as unlawful as a totally void one, is obnoxious to the criticism that the want of power to declare its invalidity goes to the

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very marrow of the law itself; for the active and practical administration and execution of the law is the prime function of all law-making. And to regard the essence of the contract as vicious, and to call the want of any power in the State to annul the contract a mere incident, is to mistake the shadow for the substance. *Hodgins* v. *McNeil* shows that the temporal Courts, which have no jurisdiction themselves, must regard every marriage (*i.e.* every *voidable* marriage) *de facto* as good until it is declared void by the ecclesiastical Courts. It is a question how far it may be argued that such a marriage is legal under the 11 Geo. IV., cap. 36, which authorizes marriages between persons "not under *legal* disqualification." It however involves a *petitio principii*, for the legality must first be determined. But a distinction, which would furnish a premiss for such an argument, is made by the Act between "canonical" and "legal" disqualifications. Almost the only real significance the question acquires here, is in cases of succession to real estate in the Mother Country. The legal aspect of the case is used by the writer only as an introduction to the main object of the article, which is to direct attention to the Divine Law.

Central Law Journal.—18th March, 1881.

Evidence of Conspiracies, ANONYMOUS, cites a few English and American cases.

Ibid.—25th March, 1881.

Delegation of Discretionary Powers by a Trustee.—I.—By ARTHUR BIDDLE. "A trustee can not delegate to a co-trustee or a stranger, any power to which is attached the exercise of a discretion." Upon this text the writer enlarges. He points out, however, that a merely ministerial duty or office may be delegated by a trustee, when it requires absolutely no greater degree of discretion than what is attendant upon the execution of any purely ministerial act. A dictum of Chancellor Walworth's is cited for the proposition that where a general authority can not be given to an agent to sell and convey lands, the agent may be safely entrusted with a discretionary power to contract, subject to ratification by the trustees, who shall then personally execute the conveyance. A few cases are cited to show that there is no distinction to be made between those cases where there is given the trustee a naked power, and where he has a power coupled with an interest, though the contention has been made that in the latter case the power may be delegated but not in the former.

Ibid.—1st April, 1881.

Delegation of Discretionary Powers by a Trustee, CONCLUDED. The case of a trustee being also executor is discussed; and it is shown that there is no difference between real and personal estate with regard to the application of the rule. Where trustees reside abroad or where cases of urgent necessity arise, it is contended that a delegation may be made.

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Ibid.—*8th April*, 1881,

Local Option in Ohio -- A Reply to Henry Wade Rogers, by CHARLES R. GRANT. Not disputing certain general propositions of law, with respect to the unconstitutionality of laws which are intended to become operative only upon and by the expression of the will of the people, the writer criticizes the cases cited by Mr. Rogers, in his article reviewed at page 246 of this Journal. He confines his discussion to the question as far as it is affected by the Constitution of Ohio, by which, "all laws of a general nature shall have a uniform operation throughout the State, nor shall any Act, except such as relate to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except as otherwise provided in this constitution."

Ibid.—*15th April*, 1881.

Literary Property, by HENRY WADE ROGERS.

The Common Law rights of an author are stated, and the answers to the questions put the Judges in *Donaldson* v. *Becket*, 4 Burr. 2408. The result is summed up thus:—"No doubt exists as to the fact that an author did possess, by the Common Law, a property-right in his unpublished manuscripts; and it may also be considered as established beyond all controversy, that when the author has once published his writings, he loses his private rights therein, and they become public property, and subject to the free use of the public—in other words, that copyright exists only by statute." The statutes, English and American, are then touched upon. What is a dedication to the public, or a publication, is considered; and the writer proceeds to discuss the law affecting copyright in the manuscript of a play and the right to its representation. Passing on to the right of property in letters, the law as laid down by Judge Story is enunciated. Abridgments, digests and translations are then dealt with. "A reporter has a copyright in his marginal notes, and in the arguments of counsel as prepared and arranged by him, though he has none in the opinions of the Court." English and American cases are cited.

Ibid—*22nd April*, 1881.

The Right of Exemption as applied to Partnership Property, by W. L. STONEX, cites American cases.

Contracts by Telegraph, by C. G. TIEDEMAN. The subjects discussed are, 1. The sender of telegram bound by the terms of the message as delivered to the receiver. 2. Contracts by telegraph in relation to the statute of frauds and the rules of evidence concerning written and parol contracts. 3. At what point of the correspondence by telegraph the contract is consummated. On the first question, the American Courts have held that the telegraph company becomes the agent of the sender for the purposes of the message, and that the message as delivered binds the principal, though containing an error. *Henkel* v. *Pape*, L. R. 6. Ex. 7, is then cited, to illustrate the English law. The defendant, who was offered

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fifty rifles, telegraphed for "*three* rifles." By an error in transmission the message was delivered reading, "*the* rifles." The fifty rifles were sent and refused, and it was held that the defendant was not liable for breach of contract, but could be held for the three rifles only. On the second question, whether the sender writes and signs the message himself, or dictates it to the operator, is immaterial, as in either case the American Courts have decided that the authorization is complete. The English law on this branch is not discussed. On the third point, the law as to the consummation of a contract by dropping a letter into the post in answer to a letter received thereby, has been applied to contracts by telegraph in the United States. In *British and American Telegraph Co.* v. *Colson*, L. R. 6 Ex. 108, cited to illustrate the English law, it was held that the message must be actually received before the contract is complete. The writer goes on to say that this case after severe criticism, has been over-ruled. Where the offer is by mail, and the acceptance by telegraph, the writer thinks that, if the telegram failed to reach the offerer, it would be impossible to hold the contract perfected, unless an authority, express or implied, to accept by telegram, were established.

Irish Law Times.—*12th March*, 1881.

Adulteration of Food and Drugs, continued in the following number, indicates many of the obstructions that are placed in the way of the prosecution of offenders. Though many technicalities retarded the operation of the Act at first, the tendency has been to carry out its spirit.

Ibid.—*19th March*, 1881.

The Royal Commissioners' Report on the Registration of Deeds and Assurances. A summary of the opinions and recommendations of the Commissioners appointed three years ago to enquire into this matter is given. It comprises twenty-seven heads, a number of which are suggestions with reference to the appointment and promotion of the clerks. The Commissioners report that the system of printing into bound books is practicable and may be applied with advantage to the construction of the abstract book. Copying by photozincography is also suggested, but not recommended, on account of its great attendant expense.

The expense of registration by depositing a duplicate is said to be too great. From this report we learn that the astonishing balance of surplus receipts, amounting to over £40,000, is in the hands of the Treasury; and it is suggested that it should be applied for the purpose of improving the department. The report was not unanimously adopted by the Commissioners.

Ibid.—*26th March*, 1881.

We gather from the criticisms upon the above-mentioned report, in this and the following number, that, in addition to the suggestions as to the method of transcribing, it has been suggested that memorials should be

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abolished, and therefor should be substituted a skeleton abstract of the deed. This is severely criticised, as the only information which it would give would be the existence of such and such a deed, without disclosing its effect or bearing upon the title. The chief complaint seems to be the expense of transcribing the lengthy deeds in full. Otherwise, a more rational plan cannot be conceived.

Law Journal.—12th March, 1881.

Mortgages and Garnishee Orders, discusses some intricate phases of the practice of garnishment.

Ibid.—19*th March*, 1881.

Mr. Bradlaugh's Position is discussed. The writer says, that the opinion has been previously expressed in the columns of the *Law Journal*, that, "if the House of Commons were to allow Mr. Bradlaugh to take the oath, no Court of law would then inquire into his religious belief. The Court would assume that the oath had been properly guarded by the House of Commons."

Debenham v. Mellon in the Lords. This much discussed case is again discussed. The chief point of the case, as we understand it, is that the question of the right of the wife to bind her husband, is an issue of fact to be tried in each case, and is not founded upon a "mandate of law, by the mere fact of marriage." Though at the time it was thought to be a startling decision, every one has by this time discovered that it contains nothing new in doctrine.

Ibid.—2*nd April*, 1881.

Arson by Insurer's Wife. The case of *The Midland Counties Insurance Company* v. *Smith and Wife*, which appears in the notes of cases in this number, decides that an action for damages by an insurance company does not lie against husband and wife, for the act of the wife in setting fire to and destroying the insured property. *Semble*, also, that a felonious burning by the wife of the assured, without his privity, is covered by the ordinary fire policy. A few remarks are made upon the case, and a case of *Simpson* v. *Burrell*, L. R. 3 App. Cas. 279, is compared. The effect will probably be a modification of fire policies to meet the difficulty.

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Law Society of Upper Canada.

HILARY TERM, 44TH VICTORIÆ.

During the Term the following gentlemen were called to the Bar.

The names are arranged in the order in which they entered the Society, and not in the order of merit.

George A. Skinner, John Philpot Curran, Reginald Boultbee, Harris Buchanan, Goodwin Gibson, Wm. James Thornley Dickson, James Alex. Allan, Walter Alexander Wilkes, James Harley, William White, Daniel Erastus Sheppard, Wallace Nesbitt, James B. McKillop, Colin Campbell, Philip Henry Drayton, Thomas C. L. Armstrong, John Doherty, Alex. Dawson, Thomas Dickie Cumberland, J. Gordon Jones.

And the following gentlemen were admitted into the Society as Students-at-Law.

GRADUATE.

Henry Gordon Mackenzie.

MATRICULANTS OF UNIVERSITIES.

James M. Knowlson, Edwin Mowat Henry, Edward Wilson Boyd, Reginald Rudyerd Boulton, William Arthur Campbell, Arthur Lake Rundle, Frederick Laing Fraser.

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JUNIOR CLASS.

James F. Williamson, John Thacker, Edmund Walker Head Van Allen Robert George Code, Wm. Robert Smith, Wm. Nassau Irwin, Edward Herbert Ambrose, George Edgar Martin, John Smith Meek, Archibald McKechnie, Wm. Henry Tweedale, Thomas Francis Johnson, Sidney Chilton Mewburn, George Hutchison Esten, Wm. Lawrence Leslie.

And the following gentlemen passed their examination as Articled Clerks :—

Albert Wesley Benjamin, John Hambly, James Joseph Berry.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination shall be :—

Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery; O'Sullivan's Manual of Government in Canada; the Dominion and Ontario Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, R. S. O., and amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows :—

Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (Chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Torts; Caps. 49, 95, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris' Principles of Law, and Books III. and IV. of Broom's Common Law, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

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FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Primary Examination for Students-at-Law and Articled Clerks will begin on the 2nd Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATION FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other Candidates for admission as Articled Clerks or Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

ARTICLED CLERKS.

1881.

Ovid, Fasti, B. I., vv. 1-300: or
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

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STUDENTS-AT-LAW.

1881.

CLASSICS.

Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.
Cicero in Catilinam, II., III., IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

ENGLISH POEM.

Lady of the Lake, with special reference to Cantos V. and VI.

1882.

CLASSICS.

Xenophon, Anabasis, B. I.
Homer, Iliad, B. VI.
Cæsar, Bellum Britannicum (B. G. B. IV. c. 20-36, B. V., c. 8-23.)
Cicero, Pro Archia.
Virgil, Æneid, B. II., vv. 1-317.
Ovid, Heroides, Epistles V. XIII.

ENGLISH POEM.

The Deserted Village. | The Task, B. III.

1883.

CLASSICS.

Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Æneid, B. V., vv. 1-361.
Ovid, Heroides, Epistles V. XIII.

ENGLISH POEM.

Marmion, with special reference to Cantos V. and VI.
Paper on Latin Grammar, on which special stress will be laid.
Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid. Bb. [I. II., III.

ENGLISH.

A Paper on English Grammar.
Composition.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive Roman History, from the commencement of the Second Punic War to the Death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography--Greece, Italy, and Asia Minor. Modern Geography---North America and Europe.

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Optional Subjects instead of Greek:—

FRENCH.

A Paper on Grammar.

Translation from English into French Prose:—

1881—Emile de Bonnechose, Lazare Hoche.

Or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, 7th edition, and Sommerville's Physical Geography.

Articled Clerks will be examined in the same years in the same portions of Ovid or Virgil, as noted above for Students-at-Law, at the option of the candidate.

A Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

THE NEW BENCHERS.

The balloting for Benchers resulted in the election of the following gentlemen:—

W. R. Meredith, Q. C., D. McCarthy, Q. C., James Bethune, Q. C., D. B. Read, Q. C., Thomas Ferguson, Q. C., D. McMichael, Q. C., F. McKelcan, Q. C., James Maclennan, Q. C., John Hoskin, Q. C., Charles Moss, T. M. Benson, Q. C., Thos. Robertson, Q. C., J. K. Kerr, Q. C., Hector Cameron, Q. C., Æ. Irving, Q. C., B. M. Britton, Q. C., John Bell, Q. C., A. S. Hardy, Q. C., J. J. Foy, H. W. M. Murray, Stephen Richards, Q. C., T. B. Pardee, Q. C., E. Martin, Q. C., James F. Smith, W. H. Scott, Q. C., John Crickmore, J. H. Ferguson, David Glass, Q. C., Andrew Lemon, Larratt W. Smith, D. C. L.

The names are arranged according to the number of votes respectively obtained by the candidates.

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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

In Chancery.

[THE FULL COURT.

Re CALLAGHAN.

Quieting Titles Act—Misdescription in Will—Misdescription in Deed—Effect of.

Where a petitioner, under the Q. T. Act, claimed title as devisee of certain land, but the description of the land in the will was different from that of the land which he claimed,

Held, that he might establish a title on shewing a misdescription in the will.

But where a misdescription occurred in a deed,

Held, that the petitioner had merely established an equity to have the deed reformed; and under the Act the Court could not declare the title established as though the deed had in fact been reformed.

[19TH APRIL, 1881.

NEILL v. CARROLL.

Mechanics' lien Act—Computation of time.

Upon re-hearing, the judgment of the Chancellor, reported in 28 Gr. 30, was affirmed.

Watson, for plaintiff.

Myers and *Howard*, for defendants.

JELLETT v. ANDERSON.

Ferry, disturbance of—License of right to ferry—C. S. U. C., cap. 40, sec. 10.

Upon re-hearing, the judgment of the Chancellor, reported in 27 Gr. 411, was affirmed.

Boyd, Q.C., for plaintiff.

Bethune, Q.C., for defendant.

[BLAKE, V.C., 6TH APRIL, 1881.

DIRECT CABLE COMPANY v. DOMINION TELEGRAPH COMPANY *et al.*

Arbitration and Award—Jurisdiction of Courts pending Arbitration—Neglect or refusal to act—Construction of—Cross relief—What may be asked for in.

On a bill filed to restrain the defendant company from proceeding with an arbitration before arbitrators irregularly appointed, where exception was taken to the jurisdiction of the Court,

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Held, that the following general rules applied to this case:—(i). The Court retains jurisdiction unless it be expressly taken from it. (ii). That where the submission is to be made a rule of a particular Court, no other Court will interfere when the award is made either to enforce it or to set it aside even before the submission be made a rule of Court. (iii). That, until the submission be made a rule of the Court designated, another Court has jurisdiction, under certain circumstances, to regulate the course of proceeding which may be taken in the matter of the arbitration. And that, therefore, the Court had power to interfere under the facts hereinafter stated.

The plaintiffs, on the 19th June, and within the proper time, appointed an arbitrator, D., who accepted the office, and was recognized by the defendant company as the plaintiffs' arbitrator. A name was submitted by D. to S., the defendant company's arbitrator, as umpire, but the appointment was not made. No communication took place between the arbitrators until the 28th June, when S. asked for an interview with D. The latter had arranged to leave New York, where both carried on business, and did leave on that day, and had returned at ten a.m., on the 30th, the time for appointing an umpire having expired on the 29th June. In his absence, his partners, acting for him, had named C. as umpire, which D. ratified immediately on his return. The defendant company then proceeded to appoint B. as an arbitrator for the plaintiffs, and an umpire was then named under the power in the submission, on the ground that the arbitrator named by the defendant "had refused or neglected to act as such."

Held, that D., the defendants' arbitrator, had not neglected or refused to act, but, on the contrary, had shown willingness to act, and that the pretended appointment of B. for the plaintiffs by the defendants' company, was illegal, and that the plaintiffs were entitled to a declaration that D. was the only appointed arbitator of the plaintiffs, and to restrain the defendant company from prosecuting the reference before the arbitrators as constituted by them.

The defendant company, by their answer, prayed, by way of cross relief, that the matters in dispute should be withdrawn from the arbitrators, and settled by the Court. The subject matter of the bill was the grievance of the illegal constitution of the tribunal to try the questions.

Held, that such cross relief could not be granted at this suit.

Robinson, Q.C., McCarthy, Q.C., J. F. Smith and *G. M. Rae*, for plaintiffs.

Crooks, Q.C., H. Cameron, Q.C., Bethune, Q.C., and *H. Symons*, for defendants.

[7TH APRIL, 1881.

In re FLETCHER, CADDICK & DELANEY, SOLICITORS.

Remedy against Solicitor—Judgment and Execution—Summary Application.

Solicitors sold shares and collected moneys as agents of the petitioner, and received large sums of money, which they neglected to hand over to the petitioner. The solicitors' costs were taxed on the application of the

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petitioner, and they were ordered to pay over the balance, after satisfaction of their bill, upon which order execution issued, and the property of one of the firm was sold, and the proceeds paid to the petitioner, and an interpleader was pending as to the goods of another. The third had nothing that could be reached by execution. A large balance still remained due. A petition was then presented, praying that the solicitors might be ordered to pay this balance, or, in default, be struck off the rolls.

Held, that though the Court had power to strike them off, yet, since the client had chosen to treat the claim as a debt from the solicitors to himself, and had proceeded to a sale of all that he could seize under execution, therefore, under the authorities, he must be taken to have chosen his remedy; and he could not now fall back on a right which he might first have exercised, unless, in addition to the non-payment of the money, there were misconduct shown on the part of the solicitors which would warrant the interference of the Court.

The petition was dismissed, without costs.

Watson, for petitioner.

A. Hoskin, Q.C., and *W. G. Cassells*, for respondents.

[14TH APRIL, 1881

McDONALD v. FORBES.

Presumption of death and intestacy—Evidence—Partition.

Where there was evidence of a negative sort which, though not conclusive, was sufficient to warrant the presumption of the death of certain parties, and also that they had died intestate, the Court in the absence of positive proof refused to presume that they had died unmarried and without issue.

While granting partition or sale of land in which these parties, if alive, would be entitled to share, the Court directed enquiries to be made and advertisements issued, their shares to remain intact in the meantime, till evidence was produced on this point.

[22ND APRIL, 1881.

In re TRELEVEN & HORNER.

Vendors and Purchasers Act—Description—Tenant for Life—Assent to Sale—Appointment of Interested Trustee—Practice.

A description of land in a deed, which refers to the same as part of a lot whose number is given, and which then goes on to say that the metes and bounds are more particularly set out in a deed, which is referred to by date, names of parties, and place, date and number of registration, is a good description.

Land was settled on a trustee, in trust for the use of H. till marriage, and then upon other trusts for the husband and wife as life tenants, and ultimately providing for the issue; the assent of the tenant for life was necessary for a sale; and there was power in the deed to appoint H. as a trustee on the original trustee's refusing etc., to act. The trustee had a sole discretion as to forfeiting and applying the estate among or for the

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benefit of the parties to the deed in case of anticipation or attempted anticipation. The original trustee resigned and appointed H. and conveyed to him.

Held, that the consent of H. and his wife as tenants for life satisfied the condition as to the assent in case of a sale; that H. as trustee was entitled to receive the purchase money, and that the purchaser was not bound to see to its application.

But it having been suggested by the Court that the appointment of H. as trustee was not one which the Court would have made, the matter came on for argument upon this point on the 25th April, when it was

Held, that H. was placed in a position, in which his interest as one of the parties to the deed upon forfeiture, might conflict with his duty as trustee, and that the Court would not have made and could not sanction his appointment.

Though on a bill filed for specific performance, if the infant children ultimately entitled under the settlement were made parties, the Court might order the completion of the sale and payment of the money into Court for investment, where it could protect the *corpus* for the children, yet on an application under the vendors and purchasers act in the absence of the other parties to the settlement, it would not compel the purchaser to accept the title.

Black, for vendor.

McMichael, *Q.C.*, for purchaser.

NOTE.—Cf. *Vankoughnet* v. *Denison*, *ante*, p. 271, as to description of land.

[PROUDFOOT, V.C., 2ND APRIL, 1881

WORKMAN v. ROBB.

Fraudulent Conveyance—Statute of Limitations.

A bill was filed in 1880, alleging that in June, 1864, defendant L. conveyed to defendant R. a lot of land; that the conveyance was a voluntary one, or that the consideration had been repaid; that L. had ever since been in possession of the land without any acknowledgment of title in R. up to January, 1880, when L. attorned to R.; that L.'s son was then put into possession. It was proved that R. was a mortgagee, and that in 1864 the equity of redemption had been released in consideration of further advances to L., who then left the country and did not return till 1867. Upon his return he went into possession and made improvements with R.'s sanction, who accepted the value of the improvements in lieu of rent.

Held, that there was no evidence of fraud in the transactions between L. and R.; and that L. could not be compelled to set up a title by possession as against R., so as to make the land exigible at the instance of the plaintiffs.

Keffer v. *Keffer*, 27 C. P. 257, distinguished.

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Vacation Court.

[OSLER, J., 11TH MARCH, 1881.

THE MONTREAL CITY AND DISTRICT SAVINGS' BANK v. CORPORATION OF PERTH.

Debenture—Conditions precedent—Presentation and Surrender—Damages—Pleading.

In an action on a debenture for £200 sterling, by which defendants agreed to pay bearer at the office of a named bank and on a day named, upon presentation and surrender of the debenture at the said office, alleging that the plaintiffs became the lawful holders and bearers thereof, before maturity, and that all conditions precedent were performed, etc., and averring as a breach, the non-payment of the said principal sum.

Held, that the presentation and surrender of the debenture at the said office, on the said date, were conditions precedent to the plaintiffs' recovery, but that interest, being merely an accessary to the principal sum, need not be claimed as damages in the declaration, and that therefore it was no departure for a replication herein to show for the first time, that damages or interest was all that was claimed; but that it was a departure for the replication to allege presentation on a day later than that named in the bond, the allegation of performance of conditions precedent in the declaration including such presentation, &c., on the day named.

A plea after traversing the presentation of the debenture, etc., alleged that it was afterwards paid, and was then duly surrendered and delivered up.

Held, a good plea, because by the exceptions taken to it, the payment of principal debt was admitted, and no more than nominal damages, if any could be recoverable; that payment or satisfaction of the debt would include the nominal damages for its detention, and that the surrender would show that the payment was in satisfaction and discharge of the debt, if not also of the damages, and that it was no answer that the surrender was by inadvertence or oversight when the surrender was intentional, but that it would be a good answer that the delivery up was on the agreement and understanding that the right to claim such damages was reserved, as the surrender would then be not for the purpose of cancellation, and with the intention of not yielding the right, if any, to damages.

S. Richards, Q.C., for plaintiffs.
R. Smith, for defendants.

[GALT, J., 25TH MARCH, 1881.

EQUITABLE LIFE ASSURANCE SOCIETY v. WRIGHT.

Principal and Surety.

Held, that the discharge or release by the creditor of one surety operates as a discharge of his co-surety or co-sureties, although they may be bound by different instruments.

Clement, for plaintiff.
Hall, for defendant.

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Common Law Chambers.

[HAGARTY, C. J., 19TH APRIL, 1881

HAYBALL v. HARRISON.

Breach of Promise—Inspection of Documents—Practice.

The defendant, on information derived from the plaintiff's attorney, applied for an order to inspect certain documents alleged to be in the possession of the plaintiff, which she further alleged were letters written by the defendant to her. The defendant denied that he had written any such letters.

Against the summons it was objected that the defendant did not admit having written any such letters, but denied their existence; and did not show that the plaintiff had them in her possession, and that the defendant at any rate was not entitled to discovery at Common Law. And it was further argued that if this discovery could be given it must be under the C. L. P. Act, which was subject to the provisions of the Evidence Act, under which the parties to a breach of promise suit were precluded from this benefit.

Mr. Dalton made the summons absolute, and on appeal from his decision it was

Held, affirming the order, that the defendant was entitled at Common Law independent of the provisions of the C. L. P. Act to inspection of letters said to have been written by him and alleged to be in the plaintiff's possession, although they were said by the defendant to be forgeries.

Aylesworth, for plaintiff.
Shepley, for defendant.

Chancery Chambers.

[BLAKE, V. C.

Re MORSE.

Quieting Titles Act — Vesting Order — Entireties — Joining of Wife—Registration of Plan—Registrar's Abstract—Substitute for.

Where a petitioner, under the Quieting Titles Act, claimed title through a vesting order made upon a sale under a decree in an administration suit,

Held, that, in the absence of proof to the contrary, the order should be assumed to be regular.

Where a deed in a chain of title had been made to a husband and wife as joint tenants,

Held, following *Shaver* v. *Hart*, 31 U. C. R. 603, that, notwithstanding the terms of the deed, the husband and wife took by entireties.

And where the husband made a conveyance of the land in the life time of his wife, she merely joining to bar her dower and predeceasing her husband,

Held, that the husband's deed conveyed the fee.

Where, pending the investigation of the title, the petitioner laid out the land into village lots, and registered a plan,

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Held, that the petition must be amended in accordance with the plan.

Where, in a petition under the Quieting Titles Act, it was shewn that the registrations on the whole lot of which the land in question formed a part, numbered over 560, and that it would take six months, and cost $100 to prepare an abstract,

Held, that the abstract might be di pensed with if the affidavit of a P.L.S. were filed, proving that he had examined all the registrations on the lot, and that only certain specified numbers affected the land in question.

Re PELTEN.

Quieting Titles Act—Tenant for Life—Consent to petition.

Where a petitioner, under the Quieting Titles Act, has only an estate in fee in remainder, the consent of the tenant for life must be obtained before the petition can be filed.

Re GILCHRIST.

Quieting Titles Act—Decree of Foreclosure—Day reserved to Infants to shew cause.

Where there was no evidence to s iew that the infants had been served with a decree of foreclosure reserving to them a day to shew cause on attaining their majority, but it was shewn that they had been served with a notice of proceedings under the Quieting Titles Act, proof of service of the decree was dispensed with.

Re DUNHAM.

Quieting Titles Act—Contestant—Certificate—Evidence.

A successful contestant under the Quieting Titles Act must file a petition in his own name before a certificate can issue in his favour; but he may use in such petition, the evidence adduced on the petition in which he was contestant.

Re FRANKLIN.

Quieting Titles Act—Division Court Bond—Release of, by 36 *Vict., cap.* 6, *sec.* 5.

All Division Court bonds made before 1st July, 1869, are effectually released by 36 Vict., cap. 6, sect. 5 (O), as to liabilities incurred thereunder, both before and since that date.

[7th MARCH, 1881.

WADSWORTH v. BELL.

Sheriff—Poundage—Allowance in lieu thereof where action intercepted.

The poundage of a Sheriff cannot be taken to cover more than the risk and responsibility cast upon him when he seizes, retains and sells goods, and from this levy returns the money. If the Sheriff 's action be intercepted, it is for the Court to say what allowance shall be made him in lieu of poundage.

Hoyles, for plaintiff.

H. Cassels, for the Sheriff.

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[PROUDFOOT, V. C.

Re MOORE.

Quieting Titles Act—Statutory discharge—Disclaimer of Mortgagees.

A certificate of discharge of mortgage is of no effect to revest the legal estate until registered. Where a certificate of discharge was lost before registration,

Held, that the disclaimer of the mortgagees, who were trustees, and the consent of their solicitors, is not sufficient to enable the Court to declare the petitioner entitled to the legal estate in fee simple.

Re CUMMINGS.

Quieting Titles Act—Effect of Conveyance pending proceedings.

Parties to whom land has been conveyed after the registration of the certificate of the filing of the petition and pending the investigation of the title, must be substituted as petitioners—Registrars' abstracts must be continued to the date of the certificate of title.

[MR. HOLMESTED, REFEREE OF TITLES.

Re RAYNERD.

Quieting Titles Act—Outstanding undivided interest—Certificate.

Where the title of a petitioner, under the Quieting Titles Act, is complete, subject to an undivided interest outstanding in trustees for the benefit of an infant, such interest must be got in by the petitioner, or be declared in the certificate of title to be outstanding.

[11TH APRIL, 1881.

In re LAYCOCK, McGILLIVRAY v. JOHNSON.

Chancery Sale—Purchase by Vendor with leave of Master.

In an administration suit, after abortive sales by auction and by tender, the plaintiff, who had the conduct of a third sale, obtained leave from the Master to bid, and at the solicitation of all parties interested, purchased the property at what was shewn to be a good price. The guardian of the infants was not aware that the Master had given the plaintiff leave to bid, but did not oppose the motion on application made to confirm the Master's report.

BLAKE, V.C.—One of the most stringent and jealously guarded rules of the Court is that a party's *prima facie* interest will not be permitted to conflict with his duty. The vendor's duty is to get as high a price as possible—his interest, if he be allowed to bid, to pay a low one. The jurisdiction in such cases rests exclusively with the Court, and the local Masters cannot invade the Court's prerogative, and expect to have that invasion confirmed by *nunc pro tunc* orders. The plaintiff's solicitor presumably knew the well-established practice of the Court; the growth of many years, the subject of many reports, and should have asked the leave of the Court before departing from the rule. To encourage this practice would be to establish a most dangerous precedent. I refuse the application.

Hoyles, for plaintiff.

Plumb, for infant defendant.

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[BLAKE, V.C., 11TH APRIL, 1881.

SIMONTON v. GRAHAM.

Interest on overdue contract—Appeal from Master—Onus probandi.

A mortgage contained the following proviso: "Provided this mortgage to be void on payment of the principal sum of $1,500 of lawful money of Canada, with interest at ten per centum, as follows: In three years from the date hereof with interest as aforesaid payable half yearly."

The usual affidavit proving the mortgage debt was made, but no evidence was given as to the current rate of interest, and the Master at Chatham allowed interest at six per cent. per annum after the date of maturity of the mortgage as damages for the detention of the debt. For the appeal it was argued that the case did not come within the rule of *In re Roberts*, L. R., 14 Ch. Div. 49, because from that case, it seemed that a different rule should prevail where the computation was made for the purpose of redemption as here, while that case was treated as if it were an action on the covenant.

Against the appeal it was argued that, as no rate after default was agreed upon by the parties, the statutory rate of six per cent. should govern; but, if not, then the mortgagee should prove the current rate when the mortage fell due, and this rate should govern. Not having done so, the Master allowed in his discretion the current rate which should not be disturbed.

Held, on appeal from this report that in the absence of evidence as to the current rate of interest at the date the mortgage fell due the Master should have taken, as the basis of calculation for subsequent interest, the rate fixed by the parties to the mortgage; and the *onus* lay upon the mortgagor or his assigns of showing that the current rate was less; and it was therefore referred beck to the Master to review his report with regard to this point.

Semble, that, but for *Dalby* v. *Humphrey*, 37 U. C. R. 514, where the parties do not, by their contract, provide for the rate of interest to be paid after default, the rate of six per cent. would in all cases be the proper rate under the provisions of the Act respecting interest.

Hoyles, for the appeal.
E. Douglas Armour, contra.

[28TH FEBRUARY, 1881.

GODERICH v. BRODIE.

Service of Bill of Complaint after twelve weeks.—Assignee in Insolvency—Absconding Defendant.

The defendant had absconded to the United States before the filing of the bill, and two months after the filing of the bill an assignee in insolvency was appointed by his creditors, and the assignee was served with the bill, but not within the time limited by the general orders. The Referee in Chambers made an order allowing the service, though made fourteen months after the bill was filed.

Held, on appeal, affirming the Referee's decision, that the defendant having absconded was a sufficient reason for not having proceeded with greater diligence.

Langton, for plaintiff.
H. Cassells, for defendant.

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First Division Court, Brant.

[MARCH, 1881.

HECKS v. PRIOR.

Ontario Medical Act—Unprofessional and unregistered practitioner—Right to recover fees.

The plaintiff, not being a physician or surgeon, nor registered under the Ontario Medical Act, sued the defendant to recover fees for "forty-one treatments of the defendant with plaintiff's electric medical motor."

JUDGE JONES *held* that the plaintiff was not entitled to recover anything for advice; but was entitled to recover for his services in applying and for the use of the electric medical motor; being of opinion that the administering of an electric shock with a view to benefitting the health of a person was no more an "operation" within the meaning of the R. S. O., cap. 142, sec. 43, than administering a Turkish bath would be for a similar purpose.

A. J. Wilkes, for plaintiff.

J. W. Bowlby, for defendant.

NOVA SCOTIA.

In the Supreme Court.

LANE v. McDONALD.

Replevin—Property.

An action of Replevin was brought with counts in trover and trespass for a large quantity of pine logs cut from lands in the township of Horton. Plaintiff claimed to have the right of possession of the land under an agreement made in 1873 with a party to whom the lots had been conveyed by deed in 1874. The defendant attempted to set up a title under proceedings adopted at a meeting of the inhabitants of the township in 1874, held for the purpose of making provision for the poor, by which certain commissioners were authorized to sell vacant lands, including as it was claimed the lands in question, but the Court held that their proceedings were entirely without legal warrant, and further, that there was no adequate proof that the lands so sold included the lots in question. Plaintiff cut a large number of logs from the lands in dispute, and put them with others cut from other lots in a boom on the ice, and defendant cut 500 trees in the disputed lot, and put them partly inside and partly outside of the plaintiff's boom, mixing them in such a way that they could not be distinguished and then claimed the whole lot as his own. Plaintiff then seized under his writ of replevin all the logs that he could identify and enough more to make up the number cut by himself on the disputed lot.

Held, that even if part of the logs replevied had been cut by defendant on land to which the plaintiff had no claim, the common law doctrine of mixture, differing from that of the civil law, gave the whole of them with out account to him whose property had been invaded, and the verdict for the plaintiff could not be set aside.

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THE

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CAN THE JURY CONVICT OF COMMON ASSAULT UPON AN INDICTMENT FOR MURDER OR MANSLAUGHTER?

(*Concluded.*)

LET us now consider the question with regard to the other part of the rule.

The second part of the rule directs that the assault must also be part of the very act or transaction which the Crown prosecutes as a felony. But whether the assault must really have been, and not merely be charged to have been, part of the transaction, is a question of some nicety, and one which, on that account creating a conflict of opinion among the judges in the Birds' case, still leaves the entire jurisprudence on the statute unsettled. And it is conceived that a consideration of the different cases which may involve it, will most safely insure its determination.

The facts which lead to the preferment of a charge of murder or manslaughter by assault, are at least one assault and the subsequent death of a human being, which, owing to the peculiar attendant circumstances, convey the supposition that they stand in the relation of cause and effect; and this supposed felonious transaction is of course the only one charged. If the assault or assaults is or are connected by the evidence with the death, the prisoner must

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be found guilty of the felony; and it is impossible for him to be convicted of assault only. This, however, is subject to a qualification; as where two persons are indicted for the same murder or manslaughter, "it may be a felony in one, and a misdemeanor in the other, according to the proof or failure of proof of the intent with which the act was done" (*a*). But if the evidence, after disclosing an assault and the death, disconnects the one from the other, no felony is proved, and the case falls mathematically within the rule. The jury must find a verdict of guilty of assault (*b*).

These cases include but one single transaction, and unless the minor part of it (the assault) is charged and proved, a verdict of acquittal must unhesitatingly be recorded. Here, the application of the rule can suffer, and in fact does suffer, no difficulty. The embarrassing point is therefore connected with those cases which include more than one transaction.

Let us suppose that A. and B. are tried for the murder of C.. The evidence supports the charge of felony as to A., and fails to do so as to B.; but discloses at the same time as to B., an assault committed immediately before, and totally disconnected from, the felony. Thus, there are two separate and distinct transactions before the Court. The one prosecuted—the felony—calls for a conviction. No finding of the charge of assault therein included can take place; for it is a conditional finding dependent on that of felony. And it is impossible to say that the Statute, nevertheless, comes into operation with regard to the other transaction; for, though the Counsel for the Crown, in his opening, may have given it as included in the felonious transaction, yet this address is certainly not the proper

(*a*) See *R.* v. *Archer*, 2 Moo. 283; *R.* v. *Cunningham*, 28 L. J. N. S., M. C. 66.

(*b*) *R.* v. *Gould*, 9 C. & P. 364; *R.* v. *Pool*, *Ibid.* 728; *R.* v. *Lewis*, 1 C. & K. 419; *R.* v. *King*, 2 Cox 95; *R.* v. *Auty*, *Ibid.* 282; *R.* v. *Rook*, 4 Cox 400.

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test by which to recognize the transaction prosecuted, as it relies on information which may, and in fact often does, turn out to be incorrect, and is delivered only with a view of enabling the jury to follow the trial. The proper test is the evidence, and the evidence has shewn this transaction of assault to be separate and distinct from the one prosecuted. It is, therefore, *dehors* the indictment (*c*). The law would be the same, if the death had not been feloniously produced. The transaction prosecuted is the felony; but it is only made out in part, that is to say, as to the assault. This assault (A.'s) goes to the jury for their decision. B.'s assault cannot be said to be prosecuted as well as A.'s, because it could in no way tend to prove the supposed felonious transaction, A.'s subsequent action determining the character of the death. It is once more *dehors* the indictment (*d*); and the result would be equal, if the felony entirely failed (*e*).

But the case (*R.* v. *Birds*) (*f*), which has been the cause of the whole trouble, is, where B., being indicted for murder, the evidence brings home to him an assault committed on the person of the deceased, but negatives its being the cause of death, which it ascribes to a blow inflicted at a subsequent time. It cannot be said that such blow was felonious; its author is not tried for it, and the jury have therefore no jurisdiction to try the matter. To say so would be in the nature of a *petitio principii:* there was a blow, and consequently a felony; there was a felony, because there was a blow. The evidence, however, has shewn that that transaction was the very one which the Crown intended to, and which it may afterwards, prosecute; and whatever verdict may be given when the proper party is tried, it does not prevent the prisoner's transaction from being quite independent of that one. A logical

(*c*) *R.* v. *Phelps*, C. & M. 180.
(*d*) *R.* v. *Gutteridge*, 9 C. & P. 471; *R.* v. *McPhane*, C. & M. 212.
(*e*) *R.* v. *Phelps*, supra.
(*f*) Infra.

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consequence of the law governing the last two preceding cases, compels the diversion of B.'s assault from the jury's attention, and prays for an acquittal (*g*).

"The broad ground taken by the judges who dissented from the conclusion arrived at by the majority in *Birds'* case was," says Richards, C.J. (*h*), "that the evidence offered on behalf of the Crown in proving the assault was so offered in proving the felony; and, until the jury pronounced upon it, and said the felony was not proved, the accused was in jeopardy as to the felony from the very assault so proved, and the jury having acquitted of the felony, should have convicted of the assault, if the accused was guilty of it. If he was not guilty, then the general verdict of not guilty should free him again from being put on his trial for the offence which was proved before."

"The accused was in jeopardy as to the felony;" so says Chief Justice Richards, and that assertion is unassailable. But he was not in jeopardy as to the assault. It seems that this distinction fully answers the objection.

"Of course," continues the learned Judge, "an assault six months before the death of the party, and which had nothing to do with it, could not be brought in; but, if the assault was just about the time of the death, and it was contended and attempted to be proved on behalf of the Crown that it did occasion the death, but failing to prove that, then the case contemplated by the Legislature was made out."

This argument allows space of time to interfere with the application of a principle, which, it is apprehended, cannot be easily understood.

Then, the true criterion to be derived from the law of the different cases which have been examined, as deter-

(*g*) *R.* v. *Birds*, 2 Den. 94; 5 Cox 20; *R.* v. *Cregan*, 1 Hannay 36.
(*h*) *R.* v. *Smith*, 34 U. C. R. 557.

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mining, as a general rule, to what cases the second part of the rule of construction of the Statute is applicable, is when the assault is proved by the evidence adduced at the trial to be part of the very transaction prosecuted as a felony; for otherwise the assault is separate and distinct from such transaction. These cases shew at the same time that indictments for murder and manslaughter may quite possibly result in a verdict for assault, and, indeed, six out of the eight judges forming the majority in *R.* v. *Birds*, entertained this opinion.

This, it seems, would put an end to the discussion of the subject of this thesis, if it were not for a desire to question the propriety of that part of the rule which has just been under consideration. The first part of the rule requiring that the assault should be included in the charge on the face of the indictment, that is to say, that, according to the interpretation contended for in the first part of this paper, the crime charged should, as a species, include an assault, —that necessarily implies that the particular transaction prosecuted as such crime, should include an assault connected with the crime. "The assault," says Parke, B., in *R.* v. *St. George*, "must be an *assault involved and connected with the felony charged.*" "A felony including an assault may be said to consist of the assault, the intent to commit the felony, and the actual felony." If the jury negative the intent, the assault is an entire transaction by itself; it does not fall within the crime charged, it is not a constituent part of that crime, and that assault only which partakes of what is proper to the essence of such crime the statute contemplates. The assault must conduce to the felony, inasmuch as it tends to prove it, and was committed in furtherance of it, which cannot most decidedly be ascertained if the intent is negatived. The intent connects the assault with the felony. It was said by Martin, B., in *R.* v. *Birds*, that, "If . . . the assault must conduce to the death, the consequence seems . . . inevitable that in all cases of alleged murder or manslaughter there cannot be a conviction for an assault at all under the Statute, for if the

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assault conduces to the death, the party whose assault is so conducive must either be guilty of murder or manslaughter, or his assault must be a lawful and justifiable act." This reasoning was found correct, and followed by the majority in *R.* v. *Ganes*, already cited, but it appears to result from a misconception of the word "conduce." An assault is conducive to a felony, when it is coupled with something (the intent) which no longer allows it to remain an entire transaction by itself, and places it on the way to the commission of the felony. Thus, A. assaults B., and causes him some grievous bodily harm, and says that he is determined to put him to death; (32-33 Vict., cap. 20, sec. 10). B. dies sometime afterwards, and A. is indicted for murder. But the medical witness deposes that the blows given could not cause death, which he attributes to the course of nature. There, no murder was perpetrated, and yet the assault was conducive to it, for it was coupled with the intent. The operation of the Statute is thus confined to those cases which disclose an attempt to commit the felony.

This construction has also the advantage of being in harmony with the character of the penal provision contained in the enactment (sec. 51), and repels the anomaly of authorizing a sentence of five years' imprisonment in the penitentiary on a conviction of common assault upon an indictment for felony, whereas an indictment for the misdemeanor would at most make the prisoner liable to be confined in a common gaol for one year with hard labour; (32-33 Vict., cap. 20, sec. 47). It is true that the discretion which in the first instance belongs to the Court is not likely to be abused, but a rather serious case may occur, in which a discretion, extended by mere accident, may work liabilities which the law never contemplated (*i*).

The jurisprudence on this point may be collected from a number of decisions which it is impossible to reconcile;

(*i*) See 2 Den. 151.

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and this is the more to be regretted, as some of these decisions have been rendered by the same judges. The first case in chronological order is the case of *R.* v. *Ellis* (*j*), A.D. 1838, where Alderson, B., with the concurrence of Park, J., said, "that the words 'the crime charged' were intended to signify the charge, as stated in the indictment; and that, in all cases of felony, where an assault was stated as part of the charge, the jury were at liberty to acquit of the felony, and find the party guilty of a common assault. His Lordship added, that the point had been reserved by Mr. Baron Parke for the opinion of the fifteen judges, who had decided the question in the way he had mentioned, and did not express any doubt upon the subject." This was adverted to in *R.* v. *Boden* (*k*) A.D. 1844, by Parke, B., after conferring with Coleridge, J., who also said that there existed another construction which was, "that the Statute *authorized* a conviction of that assault which *was* offered in evidence on the part of the prosecution in support of the felony charged. . . . Another view of the Statute" (the very one taken by the present writer) "had been suggested in a very learned note to a recent edition (*l*) of Mr. Sergt. Russell's work on the Criminal Law; but it *seemed to the learned Baron* that that view of the Statute would exclude a large number of cases, such as cutting with intent to do grievous bodily harm; and that there were so many instances in which it *had* been held that the Statute applied to such cases, that *he thought it could not* be so limited." This view of the Statute was again disapproved of, and for the same reason, as it appears in the learned Baron's opinion in the *Birds'* case (*m*), by the eleven judges who determined *R.* v. *Birch*, and who "thought, upon consulting all the authorities, that this enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor," proceeding at the same time to dis-

(*j*) 8 C. & P. 654.
(*k*) 1 C. & K. 395.
(*l*) 3rd edition.
(*m*) 2 Den. 201.

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approve of the construction laid down in *R.* v. *Ellis*, "was it to be extended to all cases in which the indictment for felony on the face of it charged an assault" (*n*). These cases, *R.* v. *Ellis*, *R.* v. *Boden*, and *R.* v. *Birch*, together with, amongst other cases, six reported cases of cutting with intent (*o*), of which *R.* v. *Cruse and Wife* (*p*), as having been decided by twelve of the fifteen judges of England, is the principal, are the authorities against the doctrine which has just been expounded.

The cases supporting this doctrine are *R.* v. *Gutteridges* (*q*), and *R.* v. *St. George* (*r*), both determined in 1840, by Parke, B., before whom it afterwards appeared, in *R.* v. *Boden*, according to the assertion of Counsel, that Rolfe, B. had altered his opinion on this subject, it agreeing finally with the two last mentioned cases; *R.* v. *Phelps*, A.D. 1841, decided, like *B.* v. *Birch*, by the whole body of the Judges of England; *R.* v. *Crumpton* (*s*), A.D. 1842, per Patteson, J.; *R.* v. *Greenwood* (*t*), A.D. 1846, per Wightman and Cresswell, JJ.; *R.* v. *Connor* (*u*), and *R.* v. *Goadby* (*v*), determined in 1847, the first by Murphy, Sergt., who consulted Pollock, C.B., and the other by the Chief Baron. To these cases may be added *R.* v. *Cregan* (*w*).

The last three English cases having been decided after *R.* v. *Birch*, shew that the authority of this case was not sufficient to prevent the judges who heard them from abiding by an opinion which, after all, they considered to be, in principle, the true one. One of those learned judges, Mr. Justice Cresswell, afterwards said in the *Birds'* case, "that if the question had been a new one, and he had been called upon to construe the enactment, without reference to

(*n*) 1 Den. 186.

(*o*) *R.* v. *Hagan*, 8 C. & P. 167; *R.* v. *Malings*, 8 C. & P. 242; *R.* v. *Nicholls*, 9 C. & P. 267; *R.* v. *Sullivan*, C. & M. 209; *R.* v. *McPhane*, C. & M. 212; *R.* v. *Cronan*, 24 C. P. 106.

(*p*) 2 Moo. C. C. 53.
(*q*) 9 C. & P. 471.
(*r*) *Ibid.* 483.
(*s*) C. & M. 597.
(*t*) 2 C. & K. 339.
(*u*) *Ibid.* 518.
(*v*) *Ibid.* 782. n. (*a*).
(*w*) 1 Hannay 36.

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decided cases, he should probably have been of opinion that it was intended to apply to those cases only, where an attempt had been made to commit a felony, which had not been perfected, and in making the attempt an assault had been committed" (*x*). The cases subsequently referred to by the learned judge are *R.* v. *Birch* and *R.* v. *Phelps*, the gravest of all, and on points which are not exclusive one of the other. This course appears to have been followed, as may be inferred from a passage in Lord Chief Justice Jervis' opinion in the same case (*y*), on account of the greatest confusion which was created by a reference to all the authorities. This most unsatisfactory result induced the Chief Justice of England, Lord Campbell, to close his remarks on the case by expressing a wish that the Legislature would speedily repeal or explain the enactment which was the cause of the whole trouble (*z*). "This was on the 11th February, 1851, and on the 7th August of the same year, Parliament repealed the objectionable clause" (*a*).

The Statute (14 & 15 Vict., cap. 100) bearing the repealing enactment (sec. 10), contains a new enactment (sec. 9), to which section 49 of 32-33 Vict. cap. 29 (D), corresponds. Section 49 recites, "If, on the trial of any person charged with any felony or misdemeanor, it appears to the jury upon the evidence, that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same. . . ." Then, if the prosecutor fails in proving the felony (murder or manslaughter), but succeeds in proving an attempt, it seems at first sight that the case would come under the operation of section 49, and section 51 would thereby be eluded.

(*x*) 2 Den. 162.
(*y*) 2 Den. 210.
(*z*) 2 Den. 223-224.
(*a*) 2 Taschereau 267.

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But it has been held in *R.* v. *Connell* (*b*), A.D. 1853, by Williams and Talfourd, JJ., that section 9, of cap. 100 (our section 49), applies only to misdemeanant, and not to felonious, attempts, such as most attempts to murder; 7 Wm. IV. and 1 Vict., cap. 85, ss. 2 and 3 (Imp.); 24-25 Vict., cap. 100, s. 15; 32-33 Vict., cap. 20, ss. 10, 13 and 14 (D). The reason of this ruling no doubt was, that, at Common Law "a felony is partible, and therefore if the charge necessarily includes two felonies, there may be a conviction of the lesser, and an acquittal of the greater" (*c*); and that the Statute evidently could not have intended to provide for such a case. The same case determines that the Common Law does not allow a conviction of felonious attempt upon an indictment for murder or manslaughter.

In conclusion, therefore, the jury cannot, in law, convict of assault upon an indictment for murder or manslaughter, because those crimes do not involve an assault,—while they can, in fact, when the case discloses an assault with intent. But as such a verdict must be justified both by law and the facts of the case, it cannot be returned in cases of murder and manslaughter. Moreover,—and this consideration may, perhaps, prove of particular importance in cases of indictments in the old form where the evidence adduces an assault with intent,—it is submitted that this verdict is expressly prohibited by Statute.

The second part of section 19 of our Offences against the Person Act (32-33 Vict., cap. 20) grants to the jury the same power as section 49, and under similar circumstances, with regard to a verdict of guilty of cutting, stabbing, wounding or inflicting grievous bodily harm, on any indictment for felony, except in cases of murder and manslaughter, which alleges that the prisoner did cut, stab, wound or inflict grievous bodily harm. A conviction of common assault on an indictment for any of the crimes of

(*b*) 6 Cox 178.
(*c*) *R.* v. *Reid*, 2 Den. 90.

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cutting, stabbing, etc., is perfectly legal, for they all necessarily include an assault. "It is not necessary," says Kelly, C.B., in *R.* v. *Taylor* (*d*), "that matters of aggravation stated in the indictment should be proved, and if not proved the prisoner may be found guilty of the offence without the circumstances of aggravation. . . . On an indictment for a misdemeanor the jury may find the prisoner guilty of any lesser misdemeanor that is necessarily included in the offence as charged" (*e*). It may be thus concluded that, as a general rule, section 19 prohibits a conviction of assault in cases of murder and manslaughter; for if it prohibits the greater (a conviction of cutting, etc.), it prohibits the less. That this has been the intention of the Imperial Legislature, in passing section 5, cap. 19, of 14 & 15 Vict., correspondent to our section 19, cannot be doubted for a moment, for section 5 was enacted in the same session as sections 9 and 10 (the latter is the repealing section) of cap. 100. It might perhaps be said that the intention of the Canadian Legislature was not so clear, because it enacted cap. 20, sec. 19, and cap. 29, sec. 51, which latter section is the contrary of the Imperial repealing section, at the very same time. But it seems that section 19 excepts murder and manslaughter from the operation of section 51, and this exception it has been endeavoured throughout this paper to demonstrate to be founded in reason.

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(*d*) L. R. 1 C. C. R. 194.

(*e*) *R.* v. *Oliver*, Bell C. C. 287; *R.* v. *Yeadon*, L. & C. 81; *R.* v. *Taylor*, 11 Cox 261; *R.* v. *Conwell*, 11 Cox 263.

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EDITORIAL REVIEW.

Changes in the Judiciary.

Within the past few months every Province of the Dominion, save New Brunswick and Prince Edward Island, has undergone some change or disturbance upon the Bench. Commencing at the far West, the Bench of British Columbia received strength from the accession thereto of the Hon. Jno. F. McCreight, Q.C., and the Hon. A. Rocke Robertson, Q.C. In Manitoba, Jas. A. Miller, Esq. ascended the Bench, while, unfortunately for the honour of it, a petition was lately presented to Parliament complaining of the Chief Justice of that Province. In Quebec a new seat has been created in the Court of Queen's Bench, which has been filled by Mr. Justice Baby. The latter is succeeded by Richard Alleyn, Esq., Q.C., in the Superior Court.

In Nova Scotia, Chief Justice Sir Wm. Young, after a long period of service, has retired; and the Hon. James McDonald, Minister of Justice for Canada, succeeds him.

With the exception of Quebec, where a little excitement prevailed, and Manitoba, where, or at least as to which, we hear a good deal of regret expressed, the changes took place quietly and without event. But in Ontario there has been truly a disturbance in the judicial atmosphere.

We have before shortly spoken of the elevation of the late Chancellor to the Chief Justiceship of Ontario. His Lordship and the new Chancellor having been sworn in at Government House on the morning of the eleventh of May, took their seats in their respective Courts on the same day. In the Court of Appeal, Mr. Bethune, Q.C. presented the compliments of the Bar, and the Chief Justice responded, by offering congratulations upon the kindly relations existing between Bench and Bar, and by graceful allusions to his Lordship's illustrious predecessors in both Courts.

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In the Court of Chancery, the appointment of Mr. Boyd, Q.C., to the Chancellorship is, perhaps, at once the most popular and the best deserved that could have been made. A sound lawyer, of extensive practice and experience, he, in addition to his many other qualifications for the high office, possesses one which is not the least essential in a judge, namely, urbanity of manners. No where has it been better exemplified than in the reply of his Lordship to the address presented by Mr. Beaty, Q.C., on behalf of the Bar, at the opening of the Court on the eleventh of May last. His Lordship said:—"It would seem mere affectation on my part to say that I am not gratified by my appointment to this position, not merely by the fact, but also by the manner of it, and especially by the way in which it has been received by the profession. The preferment came upon me unsolicited, and I value it all the more on that account. From the congratulations I have received from members of the Bar privately and thus publicly, I feel emboldened and encouraged to hope that I may be able in some measure to answer the anticipations you have expressed. I feel that it is a matter of no small difficulty to discharge the duties of this office, filled as it has been by the distinguished men and eminent jurists to whom you have referred. I trust, however, that, aided by your sympathy and supported by your co-operation, I shall be able in some degree to follow in the steps of my predecessors in office. There is one thing I shall never forget, that I myself have been a member of the Bar, and that under our system the Bench and the Bar are indivisible and inseparable, and one cannot afford to slight the other. Wherever we find the Bar industrious and able, we find the same qualities on the Bench. These things make me hope that I shall not fail in discharging my duty to the Bar and to the public as well. I do not know that I can better earn the expression of approval and satisfaction which you have conveyed to me to day. I receive and reciprocate it in the same spirit in which it is given. I hope that in my future career I may never do or say one act or word which will make any one retract one word of the encouragement and

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commendation you have passed upon me to-day. I thank you, gentlemen, for your kind wishes."

His Lordship, during his short period of office, has proved a patient and faithful listener, and has exhibited the same conscientious attention to work which has always characterized him, qualities which are quite as productive of expedition in the despatch of business as a merciless hewing down of points barely stated, and an anticipation and summary disposition of half-propounded arguments.

It is but natural to turn and consider the loss that the Bar universally sustains upon the elevation of such a man to the Bench, and more particularly that sustained by those who were more immediately associated with him in business. Any apprehensions, however, that may have been entertained as to the future welfare of the firm which the present Chancellor so lately left, were somewhat allayed by the readiness—nay the haste—with which Mr. S. H. Blake, Q.C., late a Vice-Chancellor of the Court of Chancery for Ontario, hurled himself into the breach. In the absence of a reason for the action authenticated by the learned gentleman himself, we do not propose to enquire for one; but we reserve to ourselves the right to recount and criticize the facts as they present themselves to us.

The events which we have spoken of came so closely upon each other that one might well be pardoned for mistaking them for cause and effect. That they are so, however, cannot, we presume, be quite successfully contended. The lately admitted student may be excused for not knowing the wholesome British rule as to filling all vacancies upon the Bench directly from the Bar. But Mr. Blake has not lately been admitted. The merest tyro in the profession may not be aware that a Judge once appointed by Her Majesty, and sworn to perform his duties without fear, favour or affection, looks not, nor works, for promotion, but seeks in his own conscience the commendation of faithful services. But Mr. Blake is not a tyro in the profession. It is notorious that our Judges are taken

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from practice at the Bar, where they make large incomes, to serve their country for ridiculously low salaries—inadequate, in some cases, unless augmented by private means. But "which of you, intending to build a tower, sitteth not down first, and counteth the cost, whether he have sufficient to finish it?" The passage may be without point to some; but Mr. Blake has acquired distinction for qualifications eminently suited to assist him in ascertaining its truth and meaning.

It would be illogical to suppose that Mr. Blake, who accepted his commission from an administration led by the present Premier of Canada, proverbially wise in his choice of Judges, would not be among the first to recognize the wisdom of another appointment made under the same leadership. It would be a libel upon the Bench to say that either a hope of gain or a lingering affection for his brother's firm, prompted him to descend and endeavour to heal the wound which the firm had received by the severance therefrom of the present Chancellor. And there is this additional refutation of such a theory, that, admittedly, Mr. Blake's reputation at the Bar was acquired as a Chamber Counsel, while the present Chancellor's was that of a leader at the Equity Bar.

The step was, to all appearances, unpremeditated; to this extent—that the learned gentleman is too conscious of the dignity of the Canadian Bench to have supposed for any appreciable length of time preceding his resignation, or at all, that the occupation of this high office, alone and apart from other qualifications, would, in the event of his descent, cast upon the silk he now wears any greater lustre than would attract a few of the moths of the profession. The lack of premeditation is also evidenced by these facts, viz: the Vice-Chancellor Proudfoot was, at the time of Mr. Blake's resignation, holding the Sittings at Toronto, and is, we believe, under leave of absence. The Chief Justice of Ontario is precluded from hearing a number of Chancery appeals because they are from his own judgments. The Chancellor could not take his Lordship's place because

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he had been engaged in most of the cases at the Bar; and a Common Law Judge had, therefore, to leave his own Court to fill the gap. And Mr. Blake's Circuit work was but half done. For these reasons, we say that the step could not have been premeditated, Mr. Blake being too conscientious a man, with design aforethought and without good reason, to leave his post at a time when a Chancery Judge was most wanted, and but six weeks before the long vacation. Rather is it to be believed that his action is due to some unaccountable circumstance, sudden and uncontrollable enough to prevent his completion of the sittings upon his Circuit, yet of such a peculiar and (to us) inexplicable nature as not to interfere with his going the same Circuit as a Counsel, pleading before the Vice-Chancellor beside whom he lately sat, and holding the briefs which the present Chancellor left at his Chambers upon receiving his commission. The learned gentleman, ere this event, was not wont to be either mysterious or ambiguous in his words or actions. He has now presented to us, without explanation, a picture unique, rugged and pourtrayed in a few bold strokes. The scene has some dramatic effect, as well as being unique. While one who formerly graced the Court of Chancery is recounting the illustrious names of those who had adorned its Judiciary, Mr. Blake spurns with contemptuous foot the Bench which they had enobled, to plunge into the busy strife of the Bar. 'Tis true, there is a precedent for this—but only one.

But little time intervened between the resignation of Mr. Blake and the appointment of Thomas Ferguson, Esq., Q.C., to the vacancy thus created. This appointment will give unqualified satisfaction. For some years Mr. Ferguson has held his place among the leaders of our Bar. Careful, attentive and with a rare faculty of analysis, he is eminently fitted to undertake the work that will fall to his share in the Court of Chancery. While the Bar has suffered not a little lately from the changes that have taken place, the public and profession alike have cause to rejoice in the new strength acquired by the Bench.

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Judges and Head Notes.

The Judges in some of the States of the Union are required by law to write the head notes of their own judgments. A Reviewer says, "We do not think Judges are usually a success at writing head notes." But not because they are Judges, as the above quotation might imply.

The making of head notes is confessedly a difficult matter; requiring a perfect knowledge of the facts of the case, a thorough knowledge and clear perception of the principles of law which have been applied to them in the judgment, and the rare faculty of being able to condense into as small a space as possible, in as clear language and correct phraseology as possible, the whole effect, and nothing but the effect, of one or more discursive essays. The first two essentials every Judge possesses who writes a judgment. But few may possess the last and most necessary faculty. A head note should be general and particular—particular in its statement of facts, general in its enunciation of the applied principles of law. Every one of any experience in reporting can bear ample testimony of the fact that, even in one gifted with this faculty of precision and condensation, practice is required in order to enable him to produce good head notes. To ask learned Judges to undertake the practice of this art, for art it is, in addition to the labour of preparing their judgments is, we think, to ask too much, unless time ambles with them.

An effect, not anticipated, might be the result, namely, the giving to such head notes an authenticity, which they would not otherwise, and should not, possess. An unfortunate though learned Judge, not the possessor of great literary talent, and unable to say in less words what he has already said in as few words as he thought fit, might find his head notes cited as the authentic key to his judgments; and might become famous for inditing legal maxims at the head of his opinions. We apprehend that much more use might be made upon an argument by counsel, of a head note which was promulgated by a Judge as the intended effect of his judgment, than of the judg-

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ment itself with its explanatory reasoning. Should the practice become universal and should learned Judges adhere to the very prevalent custom of stating fully the facts, nothing will remain to the ancient office of Reporter save its sombre dignity.

The Judges of the Supreme Court of Michigan, however, have proved recalcitrant, and hold the Act unconstitutional which requires them to write head notes, on the ground among others that it interferes with the vested rights of third parties, to wit, publishers, which have been acquired under existing laws. A tender feeling for posterity also has a deterring influence, and the Judges feel that if they make a precedent now, the increasing business of the Courts will make the duty too burdensome a one for their successors. A more anxious consideration for posterity is, what to do with the accumulating mass of reports?

Contempt of the Division Court.

We publish, at another page, a letter from a Barrister, setting forth the fact, with a slight tinge of indignation, concerning the fining of a brother Barrister by Judge Boyd for contempt of Court. We have been at pains to discover the actual facts of the case, and have ascertained from eye-witnesses the correctness of those detailed by our correspondent. It appears that the Judge of the Division Court has no power to commit for contempt, except the statutory power conferred upon him by the Division Courts Act, sec. 217, which enacts that, "If any person wilfully insults the Judge or acting Judge, or any officer of any Division Court, during his sitting or attendance in Court, or interrupts the proceedings of the Court, any Bailiff or officer of the Court may, by order of the Judge, take the offender into custody, and the Judge may impose upon the offender a fine, etc." It is a maxim that "every Court must be sole judge of its own contempts;" and so if His Honour was convinced that he had been *wilfully* insulted, he rightfully exercised his jurisdiction, and there it ends. A calm observer, however, might find it difficult to extract

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from the Barrister's action any *wilful* attempt to defy the authority of the Judge. His Honour, if he did not feel inclined to accept the proffered explanation, might, at least, have spared our learned friend the indignity of being put in charge of a Bailiff. A circumstance, which occurred at a Court of Quarter Sessions in Montgomeryshire, England, and which bears no proportion to the slight offered the Bar in this case, was made the occasion of an indignant protest by the Bar in attendance. A solicitor applied for audience in a particular case and obtained it, whereupon all the Barristers present left the Court. The right of the Judge so to regulate the proceedings not being questioned, the *Law Journal* yet upholds the Barristers in their action, contending that when they had come from a distance to attend the Sessions and form a Bar, their privilege of exclusive audience should not have been summarily taken away.

The Status of a Retired Judge.

A doubt has been freely expressed as to the right of a retired Judge to practice at the Bar. Members of the Law Society of Upper Canada acquire by admission thereto a statutory status therein. The Judges of the Superior Courts of Common Law and the Court of Chancery acquire a statutory status with reference to the Law Society upon acceptance of their commissions, and, as Visitors of the Society, are, we presume, no longer members thereof, as they cannot occupy both the positions of visitors and visited. Once having ceased to be a member of the Law Society by becoming a visitor thereof, can a Judge on retiring again become a member of the Law Society, without undergoing the usual course prescribed for admission? We merely note the point, as, at the time of writing, we have not been able to look at the authorities. We believe, however, that authority exists for the proposition, that a visitor of a Society, upon resigning his office, does not succeed to his former rights as a member thereof.

Another question arises, assuming the right to practice at the Bar, as to the right to retain the rank and precedence

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of a Queen's Counsel in the Courts. The appointment of a Queen's Counsel is a special retainer of Counsel by the Crown. Upon acceptance of a Judge's commission by one of Her Majesty's Counsel, the retainer must, perforce, cease; inasmuch as a Judge has to determine causes between Her Majesty and her subjects. If, therefore, a Judge retires from the Bench and re-enters active practice, must he not receive a fresh retainer from the Crown before acting as one of Her Majesty's Counsel? We speak without having consulted authorities as to this point also; but we may have occasion to refer to both again. They are well worthy of serious consideration.

British Columbia Judicature Act.

We have been favoured with a copy of the Supreme Court Rules of British Columbia, which we have referred to before as having been prepared by the Attorney-General of that Province, under the Judicature Act lately introduced. Both the Act itself and the rules and orders are practically the same as the English rules, with which our learned friends of Ontario hope to become familiar during the long vacation.

Perhaps the most interesting part is to be found under the title of "Costs," which seem to be on a rather low scale. For instance, fee to counsel on appeal or re-hearing before the Full Court is $15. Arguments of demurrers and special cases, the same. But the fee at a trial or hearing is $25, with power to the taxing officers to increase it to a sum not exceeding $50. Instructions for brief in difficult cases, $5.00, is a little better. So is $2.00, the limit to which one may go in charging for letters.

No one, however, will object to the scale of disbursements. Entry of appeal, 30 cents; entry of record for trial, $1.00; entry of demurrers, etc., for argument, 30 cents, and so on.

Otherwise the tariff is mainly composed of the familiar elements of ten cents per folio for copies; fifty cents for a necessary attendance, etc.

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The Weekly Jurist.

We regret to be obliged to chronicle the demise of this journal on the completion of its second volume—the more especially so, for the reason given, namely, "the great difficulty in making collections." It speaks well for the *Jurist* that the work was pursued fairly to the end, without any diminution of attention on the part of the editors. The last number gives a full index, a table of cases reported, and a table of cases abstracted.

A PATRIARCHAL VIEW OF THE JUDICATURE ACT.

Sir M. B. Begbie, Chief Justice of British Columbia, in giving judgment in a case of the *Hudson Bay Co.* v. *Green et al.*, says of the Judicature Acts, lately introduced into that Province, which are similar to the English Acts:—"The voice is the voice of the Common Law, but the hands are the hands of the Court of Chancery."

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NOTES OF RECENT DECISIONS.

Clarke v. *Creighton*, 45 U. C. R. 514. We merely called attention to this case in our last regular number. Since then, a great deal of what Mr. Justice Armour says in his exhaustive judgment loses its sting, by the reversal of *Pike* v. *Fitzgibbon*, L. R. 14 Chy. Div. 837. We quote from Mr. Justice Armour's judgment at p. 526. "The seventh resolution adopted by the Court of Appeal in *Lawson* v. *Laidlaw*, 3 App. R. 91, was, that 'The property so liable must be property with reference to which she may be supposed to have contracted, and therefore must be property to which she is entitled when the debt is incurred.' And it is upon this resolution that the form of judgment above given was based.

"This resolution still further proves how illusory the remedy at law would be, for the intelligent married woman would take care that the property with reference to which she might be supposed to have contracted would not wait to be charged with a judgment, and in virtue of it she would probably be entitled to plead in bar of the action that she had parted with it, if she had done so before action, and by way of *puis darrein continuance*, if she had done so after action. This resolution has, however, received a rude shock in the recent cases of *Pike* v. *Fitzgibbon*, L. R. 14 Chy. Div. 837, and *Flower* v. *Buller*, 15 Chy. Div. 665, which have gone very far towards removing, if they have not altogether removed, the foundation upon which the extraordinary construction put upon the clause in question was built." Again, at p. 531, "I would not have ventured upon the opinions I have above expressed, in the face of the great and weighty authority against them, had I not felt satisfied that if the recent decisions of *Pike* v. *Fitzgibbon* and *Flower* v. *Buller* had been in existence and brought to the notice of Gwynne, J., he would never have placed the con-

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struction upon the concluding part of the 9th section which he did, and which has since been followed."

Pike v. *Fitzgibbon* having been over-ruled, his Lordship's opinion necessarily falls with it, and the Court of Appeal is vindicated, so far as authority goes. Though the learned Judge has said that he would not have ventured upon his views as expressed, had it not been for the English cases, the reasoning of his judgment upon the effect of our Statute remains intact and as forcible as ever. The writer recollects having heard the same learned Judge say during the course of an argument upon a married woman's case, that if she could not personally contract, there would arise many cases of hardship, where the husband refused to support her. For, the enquiries to be made of the circumstances of a married woman would be a practical obstacle to trading with her. Again, a married woman with separate estate would probably have no need to trade. But even if it were property of such a nature that she could not anticipate it in expectation of the result of pending or impending litigation, yet here the creditor is again met. For, says the *Law Journal*, "The points to be decided by the appeal [in *Pike* v. *Fitzgibbon*] were two: (1) Whether an obligation, contracted by a married woman, can affect property covenanted to be settled to her separate use, but not payable at the time when the obligation was contracted; (2) whether property settled to her separate use without power of anticipation is, after the determination of the coverture, liable to answer the obligation contracted when she was under coverture. The Court of Appeal has decided both these points in the negative." "The intelligent married woman" has not alone the power of defeating creditors by conveyance before judgment. Every well-informed debtor has and uses the same facilities for evading payment. And though it is one of the inconveniences from which creditors suffer, yet that alone is not sufficient ground for holding that she can anticipate by incurring debts. Under the present state of the law, the doctrine being that she *charges* her separate estate by contracting with reference thereto,

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quære, whether the result of a conveyance, feared by Mr. Justice Armour, could not be avoided by alleging that fact in a bill in equity, filing a *lis pendens*, and asking that the land be sold in order to satisfy the charge—*i. e.*, in cases where she is not restrained from anticipating.

Where the property is not so settled, but she is still entitled in expectancy only, we see no reason in justice why a Court of Equity should not assume that a married woman, so entitled, does intend to charge the estate which she is about to become possessed of. It is a very common thing, in fact, to contract with reference to future estates; and Equity has always recognized these contracts. It is a very common thing, in fact, for improvident persons to lavish their estates before succeeding to them. And Equity will recognize the charges thereupon. Why then should not Equity assume, for conscience' sake and to relieve a creditor, that a married woman, entitled *in futuro* to an estate, intends to charge it by incurring debts. The fact is, that probably many married women do so anticipate what they expect to realize. In the present state of the law, both under these cases and *Debenham* v. *Mellon*, the best course to adopt is to follow the *Law Journal's* advice—"Prudent persons will, in future, deal with married women for ready money only."

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BOOK REVIEWS.

The Law and Practice of Joint Stock Companies under the Canadian Acts. By CHARLES HENRY STEPHENS, of the Montreal Bar; author of the Quebec Law Digest. Toronto: Carswell & Co., 1881.

The subject of this work, which we have much pleasure in noticing, is the Canada Joint Stock Companies' Act, 1877. This is preceded by a fine introductory review of the history of trading and other associations, from the ancient "family" down to the modern Joint Stock Company, in which the learned author exhibits great vigour of style, and, on occasion, picturesque language. Attention is more especially directed to the doctrines of the Roman lawyers and those of the Continental Jurists; and though not of great practical value, the perusal of the introduction is pleasurable.

The first and second chapters are devoted to a *resumé* of the general principles affecting Companies, and to those relating particularly to the Prospectus, Promoters, etc.

The form of the treatise as to the remainder, is governed by the Act itself, the work taking the form of an annotation of the Act. Special attention is directed to the organization and management of Companies, and to the enactments respecting stock, and the duties and liabilities connected with its ownership.

While we have great pleasure in giving a just measure of praise to the work, as exhibiting the unquestionable literary talents of the author; while we believe that it will be found of practical use to every actively engaged practitioner; and while we think it will assist in raising the standard of Canadian Legal Authorship, we are yet bound in justice not to pass over what we conceive to be an unpardonable blemish in the method, or, we should say, want of

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method, in the citation of authorities. A case here is referred to as "lately decided in England," with no better guide to where it may be found; a case there is referred to by the page and the series of reports without giving the volume; at another place the U. C. Reports are referred to as "Q. B." simply. The author frequently cites cases from other text books and from Digests, thus raising the suspicion of the reader that he has not consulted the original reports.

The Ontario Judicature Act, 1881, annotated by THOMAS WARDLAW TAYLOR, one of Her Majesty's Counsel, and JOHN S. EWART, of Osgoode Hall, Barrister-at-Law. Toronto: Carswell & Co., 1881.

The prospect of spending the long vacation in reading, digesting and assimilating the new law and practice under this Act, is not a pleasant one to contemplate; much less pleasant will it be in presently realizing it, even with such aids as Messrs. Taylor and Ewart are furnishing us with.

While the annotators of the Act are to be congratulated in having completed their labours just as others are beginning theirs, one is apt to regard them with a certain amount of commiseration, after glancing over the numerous pages, that both indicate the results and give us some idea of the extent of the labours which they have undergone, in the short period intervening between the passage of the Act and the publication of their work.

It is some consolation to know that, out of the seven or eight hundred pages of this work, we shall not have to digest much more that one half, a great part being taken up with the forms and a *resumé* of so much of the existing practice as has been left undisturbed by the Act, the latter of which serves to make the work a complete reference book of the practice in Ontario, as far as human and legal foresight can so make it.

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The work, with the advance sheets of which we have been favoured, is divided into three parts. Part I. is devoted to the Act itself, the rules and orders, and the notes thereon. Part II. contains, in appendices to the rules, the forms given us by the Act, without notes. We might say *en passant*, that it would have been more convenient to have had these forms at the end of the volume; as the practitioner is accustomed to look for his forms in that place rather than in the middle of his books. And men, and especially lawyers, are the slaves of habit. At present, they form a partition wall between the new and the old practice. The latter, so far as it is left in force, together with various statutory enactments relating to the practice of the Courts, is contained, with annotations thereto, in the third part.

A comparative table, of no little value when it is desired to consult the English Act, is to be found at the beginning of the work.

The annotators point out, though they are not the first to notice it, the similarity in name between the Supreme Court of Judicature for Ontario and the Supreme Court of Canada, which will necessitate in each case the use of the full title to distinguish them; and which will, for those not familiar with our geography and constitution (and they are many both in England and the United States), breed confusion.

To proceed to the notes. In the first part we notice that besides calling the attention of the reader simply to points of practice under the Act, the learned commentators have made various general references which will increase largely the value of their work as a compendium of law and practice. We might instance, amongst others, the definition of a Court of Record, with remarks as to the inherent jurisdiction of such Courts, etc.; quotations from the Statutes defining the powers of the present Court of Appeal; a *resumé* of the law as to equitable rights and defences prior to this Act, as contrasted with that thereby established, with voluminous notes; the old law and practice shortly

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stated as to mandamus, injunctions and receivers; the provisions of the Administration of Justice Act as to transfer of causes; the general orders of the present Court of Appeal; portions of the C. L. P. Act relating to trials; and many other similar references, which, though neither new nor altered by the Act, are yet placed in such convenient positions, in the one volume, as to preclude the necessity of referring to half a dozen or more books.

Upon the more important sections of the Act, very full notes are given, and in all cases the very latest authorities are cited. The compilers, not always satisfied with citing them alone, have in many places taken the trouble to arrange them chronologically, thereby giving a history of the practice as it has been evolved by English judicial interpretation. Where the text requires a full explanation, the judgments cited are quoted from largely—apparently so generously as sometimes to relieve one of the necessity of turning to the report, and yet not so frequently as to lay the compilers open to the charge of padding.

It would take up too much space to refer at greater length to these particular places, and we must content ourselves with saying, that special attention seems to have been devoted to the practice as to parties and their respective, peculiar rights and liabilities, to pleading, amendments, demurrers, discovery and inspection, and all the more important heads of practice. Many cross references in the notes furnish a useful guide to the reader.

Part III., containing the Chancery Act, the Attorneys Act, the English Trustee Acts, the Ontario Act respecting Trustees and the General Orders of the Court of Chancery remaining in force notwithstanding the Judicature Act, will be found no less useful than the first part. With these Acts and Orders we are all familiar, and they do not call for any very special attention here. Taylor's Orders having, since the new orders relating to mortgages and administration of estates, become rather stale, and many cases having been decided since Mr. Holmested's annotations to the

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latter were published, an opportunity was here offered to bring together down to date all the decisions, touching the new practice in such cases. The opportunity has not been lost, and we have therefore presented to us a very full and useful reference book upon these orders.

On the whole, the book offers valuable assistance to those about to embark in the study of the Act, not only on account of the variety and quantity of its notes, but also on account of the order and method that have been observed in the arrangement. The introduction thereinto of the many rules, orders and parts of Statutes governing practice, together with the third part, which we have particularly referred to goes as far towards making it a complete book of practice, as it appears possible to go, before any interpretation has been placed upon the Act by our own Courts. It is hard to imagine what else could have been introduced in order to aid the practitioner. As it stands, it deserves a more comprehensive title than one which points to it as a work on the Judicature Act alone. We have much pleasure in congratulating the learned annotators upon the completion of their work.

The typography of the book is excellent; but we think it would have been a decided improvement to have printed the names of cases in italics. They would have been more easily distinguished from the text, and would have caught the eye more readily.

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CORRESPONDENCE.

Contempt of the Division Court.

To the Editor of the Canadian Law Times:

SIR,—I write to draw the attention of the readers of the CANADIAN LAW TIMES to an event which transpired in the Division Court for West Toronto at its last sittings.

A young Barrister of fair name and fame, who practises in this city, entered the Court-room with a client to conduct a case of the latter's which was shortly coming on for trial. The space set apart for those having business to transact was filled with suitors, on-lookers, "agents," bailiffs (bum and otherwise), witnesses, *et hoc genus omne*, and one or two barristers.

The Barrister in question and his client were forced to remain standing with many others. The Judge called upon all to be seated. A portion of a chair already occupied was offered to and accepted by the client. There being no possible place for the barrister to sit upon, he withdrew to the passage leading past the jury-box to the door and remained standing. The Judge thereupon fined him two dollars for contempt of Court and ordered a bailiff not to allow him to leave the Court-room until the fine was paid. The delinquent thereupon attempted an explanation to the Judge, excusing himself on the score of the impossibility of doing what His Honour had ordered and offered an apology. The aggravating part of the affair is that the Judge would not listen to any explanation or accept any apology.

It is notorious that many unseemly wrangles occur before this tribunal among the attendant unprofessional practitioners which show but little respect for the Court, but which pass unnoticed. It is also part of the history of

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this Court that orders for payment are systematically disobeyed on the most transparent excuses, and that it is extremely difficult to get a warrant against the passively resisting debtor for contempt of Court. By comparison with cases of this kind, the present case bears no evidence that the fine was deserved. Taking the facts by themselves I feel as a professional brother that an indignity has been offered to the Bar.

In the first place every Court owes some measure of courtesy at least to the Bar. And a proffered apology never is or should be refused. Secondly, there was no wilful contempt of the Court. And thirdly, a gross, unnecessary and inexcusable indignity was offered to a barrister by the direction to a bailiff not to allow him to leave the room until the fine was paid.

Yours, etc.,

Toronto. THEMIS.

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OSGOODE LITERARY AND LEGAL SOCIETY.

The fifth annual dinner of this Society took place at the Walker House, on Monday evening, the sixteenth of May. There was a large attendance. In addition to the usual subjects discussed, in proposing and responding to the toasts, very decided opinions were expressed by the speakers upon the subject of legal education. The crying want of a Law School for Ontario was made the burden of several speeches; and a hope was expressed, that the Benchers would do something towards retracing the retrograde step that was taken, when the Law School was abolished. The Vice-Chancellor of the University of Toronto, in responding to the toast of "The Universities," mentioned that the Senate of his University were considering the advisability of introducing some sound, practical method of imparting instruction in Law.

We understand that a member of the Corporation of Trinity College has lately procured an amendment of the statute of his University, providing for the bestowal of degrees in Law upon all who may pass the examinations required—the practice of Trinity College hitherto having been to confer degrees in Law only upon its own graduates in arts. It is proposed also, in due course, to provide for the delivery of lectures in Law. The University of Queen's College, as we have shown before, provides a course of instruction in Law, and appoints to its staff of lecturers gentlemen in active practice at the Bar.

Special reference was also made, during the course of the evening, to the fact that the Benchers, who were lately elected by the junior Bar, have in this respect yet to earn the gratitude of their constituents, by the introduction of a measure to provide some means for the education of students. We trust that this element will have some influence upon Convocation and will induce them to make an intelligent movement in this direction. At any rate there seems to be but one opinion in the profession as to the necessity for a Law School.

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REVIEW OF EXCHANGES.

American Law Register.—May, 1881.

Contempt of Court is continued. The writer, in this number, pursues the enquiry as to the power of the Superior Courts at Common Law. The jurisdiction of a Court is apparently limited by its discretion only, and will not be trenched upon by any other Court. The American authorities are then reviewed, and the points of similarity and dissimilarity between them and the English rules examined.

Trade Marks, by HUGH WEIGHTMAN. Several recent American cases are discussed, whereby the law as to whether a trade mark is an invention or a discovery is left in an uncertain state. The learned writer then gives a few references as to the nature of property in trade marks and its character.

American Law Review.—April, 1881.

The Right of a Third Person to Sue on a Contract made in his Favour, by HENRY O. TAYLOR. The subject is divided into three heads; and this power of acquiring rights through contract is discussed as it passes through three stages of development, viz: 1st. That stage where it is competent for an individual to acquire contract rights only through his own act. 2nd. That stage where he can acquire such rights through another's act, that other being his agent. 3rd. That wherein he can acquire such rights through another's act, that other not being his agent. In speaking of the historical growth of the right, the learned writer says of the Roman law, that it "never fully attained the second stage in the development of the power to acquire contract rights. With regard to that stage, it held the same position which our law holds with regard to the third. The Roman law said, 'You can acquire contract rights through your own act; you cannot acquire them through the act of another, *except* in certain cases and under certain circumstances.' Our law says, 'You can acquire contract rights through your own act, or through the act of your agent; you cannot acquire them through the act of another who is not your agent, *except* in certain cases and under certain circumstances.'" Some of the English cases are examined, but all the English law is not discussed. The American authorities are then reviewed, their tendency being towards the right to sue as a necessity in the present state of commercial society.

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The Lex Loci in Regard to Insolvent Assignments, by CHARLES R. DARLING. "The general question presented is, what operation has an assignment of an insolvent debtor's estate in a country or state other than that of the debtor?" The conclusions arrived at are thus stated:—"Insolvent assignments have, with reference to personal property, unrestricted extra-territorial operation between the parties, and as to others not creditors; and that as to creditors such assignments have not extra-territorial operation in four cases, while having it in all others. These four are:—1st. When the assignment is involuntary. 2nd. When it is in effect an assignment or delegation to the Court. 3rd. When the assignment as such would not be valid according to the law of another State, in which case it does not operate in such State. 4th. When the distribution according to the law of the debtor's domicile would not give a creditor the same share of the estate as the law of his own domicile would give him, in which case it does not operate in the State where such creditor is domiciled. The same rules apply to real property, with the qualification that the formalities required to transfer it by the *lex loci rei sitæ* must be observed."

We may refer to a case upon the subject in our own Courts, namely, *McDonald* v. *Georgian Bay Lumber Co.*, 2 App. R. 36; where it was held that a conveyance, by order of a New York Court, to the American trustee, of the Bankrupts' estate and effects, in like manner as if the bankrupts had been duly adjudged bankrupts, did not pass real estate in Canada.

Ibid.—May, 1881.

Admission to the Bar, by FRANCIS L. WELLMAN. This article reviews the system of legal education in all the States of the Union and in England. According to the writer, the system of legal education in the States is lamentably defective. Our American cousins have, however, the satisfaction of knowing, they are, to a certain extent, independent of their system, if we may look upon the number of eminent lawyers among them, and the acknowledged excellence of most of their law periodicals, as any indication of it.

With reference to our own country, the writer shows his want of knowledge of our geography, by placing Canada in his comparative table along side of several of her Provinces and classing her with them as a Province. He also shows his knowledge of that whereof he writes, by stating, that articled clerks in Canada are required to spend but *one* year in a law office—an amendment of the law which would, no doubt, rejoice the heart of many an articled clerk in Ontario, as he plods his weary five years, or three years as the case may be, through the paths of copying, serving and grinding for intermediate examinations. Some of the rules to regulate admission to the Bar, suggested by the writer, bear a very striking resemblance to those in force in the Law Society of Upper Canada; and, indeed, if in search of a system, the writer could not do better than peruse the rules of convocation critically.

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Canada Law Journal.—15th May, 1881.

Retroactive Legislation. ANONYMOUS. The writer refers to the Act "for the protection of public interests in rivers, streams and creeks," passed during the last session of the Provincial Legislature, holds the same unconstitutional, and cites precedents to show that it is unprecedented. It must be gratifying to the learned writer to know that immediately after the publication of this article the Act was disallowed by the Governor-General.

A much more glaring interference, with a pending cause, is to be found in the "Act to amend the Acts incorporating the Toronto Gravel Road and Concrete Company." In the pre-amble it recites the former charter of the company, empowering them to do what this Act prohibits; then, that there was a solemn agreement between the company and the County of York, whereby they were permitted to construct their tramway, and under which they went to vast expense; then follows the extraordinary recital that the County did not contemplate the use of steam by the company, though the latter had the right to use it under their charter; and that the County present their petition to be relieved of this agreement because the company are using steam, and the Act proceeds to deprive the company of some of their vested rights under their charter, solely because the County allege that the use of steam on the tramway is a nuisance.

If there were any ground for impeaching the agreement, surely there is power inherent in the Court of Chancery to reform it, a cause being then and now pending in that Court. If the use of steam were a public nuisance, as recited, the doors of the Court of Chancery were still open. The Act then points out what shall be done between the parties upon the decision of the pending cause, and gives to the County large powers of election as to their future course, without giving any corresponding powers to the company.

This Act is suggestive of the enquiry, What are the functions of a Provincial Legislature? To rescind a contract upon the petition of one party thereto, because he finds it a nuisance to him, bears a close resemblance to injustice. To rescind powers vested in a company by a solemn Act of Parliament looks very like confiscation. If there be no ground upon which the Courts can rescind such an agreement, it would be a most wholesome rule for the Legislature to follow to allow it to remain in force.

Central Law Journal.—29th April, 1881.

The Doctrine of Ultra Vires; under what circumstances and in whose favour it is applicable, by J. C. HARPER. The learned writer, referring to the origin of Corporations in England where they acquired special privileges granted at the public expense, shows that

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a certain advantage was thus gained by them over private citizens. Any excess of their powers was therefore an enroachment on public rights, and consequently *ultra vires*. It is thought that, in the present state of society, this reason does not exist; and *cessante ratione cessat ipsa lex*. Where contracts contravene public policy, it is said to be a question whether the Legislature intended to avoid the contract, or whether the violation of the charter is simply to be punished by the State. In cases of executory contracts, *ultra vires* may be pleaded by either party. *Bona fide* holders for value of bonds, issued by a corporation, which was entitled to issue them on performance of certain conditions, are protected where the bonds recite compliance with the conditions. Where the contract has been executed by either party, the other will not be allowed to plead *ultra vires*. The American authorities are cited to establish these propositions.

The Law of the Theatre, by W. H. WHITTAKER. A review of the leading cases, English and American, upon the Law of Injunctions, as applied to breaches of contract between managers and players. A few cases touching the conduct and right of ticket-holders are then cited.

Ibid.—*6th May*, 1881.

Executors and Continuing Guaranties, by HORACE W. MONCKTON. The learned writer deals with the class of cases arising out of simple contracts. The question to be answered is stated in the words of Pollock, C.B., in *Bradbury* v. *Morgan*, 31 L. J. Ex. 462:—"Was the agreement a mere authority, or was it a contract? If it were the former, it would be put an end to by death; if the latter, it would not." Some English, and one or two American cases are cited, the result being, "that a guarantor can, at any time by notice, terminate a guarantee not under seal, in so far as it relates to separable future transactions. Again the rule applies to protect his estate after his death, the only question being, what notice is then requisite? In answer to this, it appears that either express notice by the executor, or some form of constructive notice will effectually terminate the guaranty."

Ibid.—*13th May*, 1881.

Demurrer to Evidence, by W. L. MURFREE, Sr., recounts some ancient learning on the law and practice of demurring to evidence.

Ibid.—*20th May*, 1881.

Malicious Prosecution—The Advice of Counsel as a Defence, by JOHN D. LAWSON. A very useful article, citing English and American authorities to show under what circumstances this is a successful defence. The client must make a full disclosure of all the facts to his attorney. He must not omit to state every fact known to him, even though

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he honestly supposes it was not material; and he must have divulged every fact which by reasonable diligence he might have ascertained. If the attorney express doubt of the propriety the client is not excused; and, of course, the consulting of the attorney must not be a mere cloke. Good faith must be observed in following the advice. The attorney must be duly qualified. If he be not one, but hold himself out as one, and the client believe he is duly qualified, it is no defence, though it may be given in evidence in mitigation of damages. The attorney must be totally disinterested, otherwise he cannot give an unbiased opinion; and the advice must be given before the beginning of the proceeding. The opinion must be given on a question of law; for the client is as well able to judge of facts as his legal adviser. Where the client is advised by one attorney to proceed, and by another not to do so, the first opinion will not protect him. Nor will he be protected if he do not himself believe he have a cause of action, though he is advised that he has.

Was Death by wrongful act, default or negligence, actionable at Common Law? If so, by whom could the action be brought? by FONTAINE T. FOX, Jun. The learned writer, in answer to an article in the *Southern Law Review*, cites ancient authority to show that the action did exist, and that it might be maintained by "near relations," "or strangers bound to them by homage or by service, so that they have an interest to bring an action."

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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

In the Supreme Court of Canada.

ONTARIO.] [APRIL, 1881.

COSGRAVE v. BOYLE.

Promissory note—Death of endorser—Notice of dishonour—37 Vic. cap. 47, sec. 11 (D.).

The appellants discounted a note, made by P. and endorsed by S., in the Canadian Bank of Commerce. S. died, leaving the respondent his executor, who proved the will before the note matured. The note fell due on the 8th May, 1879, and was protested for non-payment; and the bank being unaware of the death of S., addressed a notice of protest to S. at Toronto, where the note was dated, under 37 Vic. cap. 47, sec. 11 (D). The appellants, who knew of S.'s death before maturity of the note, subsequently took up the note from the bank and sued the defendant, relying upon the notice of dishonour given by the bank, and without having given any other notice.

Held, reversing the judgment of the Court of Appeal for Ontario, that the holders of the note sued, upon when it matured, had given a good and sufficient notice to bind the defendant, and that the notice so given enured to the benefit of the appellants.

O'Sullivan, for appellants.

McMichael, Q.C., for respondent.

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SUMMERS v. THE COMMERCIAL UNION ASSURANCE CO.

Interim Receipt—Agent, powers of—Broker cannot bind Company.

This was an action brought on an interim receipt, signed by one D. Smith, as agent for the respondent company at London, Ontario. One of the pleas was that Smith was not respondent's duly authorized agent, as alleged. The general managers of the company for the Province of Ontario had appointed, by a letter, signed by them both, one Williams, as general agent for the City of London. Smith, the person by whom the interim receipt in the present case was signed, was employed by Williams to solicit applications, but had no authority from or correspondence with the head office of the company.

In his evidence Smith said he was authorized by Williams to sign interim receipts, and the jury found he was so authorized. He also stated that one of the general managers was informed that he (Smith) issued interim receipts, and that the former said he was to be considered as Williams' agent. There was no evidence that the other general manager knew what capacity Smith was acting in.

Held, affirming the judgment of the Court of Appeal for Ontario, that Williams had no power to delegate his functions, and that Smith had no authority to bind the respondent company.

H. Cameron, Q.C. (with him, *Bartram*), for appellant.

Robinson, Q.C. (with him, *W. Nicholas Miller*), for respondents.

NEW BRUNSWICK.]

RAY *et al.* v. LOCKHART *et al.*

Will—Construction of—Surplus—Whether residuary personal estate of the testator passed.

Among other bequests the testator declared as follows:—"I bequeath to the Worn-out Preachers' and Widows' Fund in connection with the Wesleyan Conference here, the sum of $1,250, to be paid out of the moneys due me by Robert Chestnut of Fredericton. I bequeath to the Bible Society one hundred pounds. I bequeath to the Wesleyan Missionary Society in connection with the Conference the sum of $1,500." Then follow other and numerous bequests. The last clause of the will is:—"Should there be any surplus or deficiency, a *pro rata* addition or deduction, as may be, to be made to the following bequests, namely, the Worn-out Preachers' and Widows' Fund; Wesleyan Missionary Society; Bible Society." When the estate came to be wound up, it was found that there was a very large surplus of personal estate, after paying all annuities and bequests. This surplus was claimed, on the one hand, under the will, by these charitable institutions, and on the other hand by the heirs-at-law and next of kin of the testator, as being residuary estate, undisposed of under his will.

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Held, affirming the judgment of the Supreme Court of New Brunswick that the "surplus" had reference to the testator's personal estate out of which the annuities and legacies were payable; and therefore a *pro rata* addition should be made to the three above-named bequests, Statutes of Mortmain not being in force in New Brunswick.

Barker, Q.C. (with him, *Sturdee*), for appellants.

Kaye, Q.C. (with him, *Stockton*), for respondents.

ONTARIO.

In the Queen's Bench.

[EASTER TERM, 1881.

CROWE v. STEEPER & WILLIAMS.

Replevin—Municipal by-law—Cattle trespassing—Liability of owner.

A by-law must be reasonably clear and unequivocal in its language in order to vary or alter the Common Law.

A municipal council by by-law passed pursuant to the municipal act, enacted that certain descriptions of animals (naming them) and all four-footed animals known to be breachy should not be allowed to run at large in the Township; and provided for fixing the height of fences. The plaintiff's cattle strayed from the highway into the lands of defendant Williams, whose fences were not of the height required by the by-law. He distrained them, and they were impounded, defendant Steeper being the pound-keeper. In an action of Replevin,

Held, that as the by-law did not affirmatively authorize cattle to run at large by negatively providing that certain classes of animals should not, the plaintiff was liable at Common Law for the damage done irrespective of any question as to the height of defendant's fences.

Robinson, Q.C., (with him, *Scane*), for plaintiff.

Bethune, Q.C., for defendants.

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In Chancery.

[BLAKE, V.C., April 1881.

ANDERSON v. BELL.

Will—Construction of—Family, meaning of—Period of Distribution.

A will contained the following clause:—"I leave all other property to my grandchildren, the children of J. C., and of my daughter A. J. B., wife of D. B., share and share alike on their coming of the age of 25 years, to be finally determined and paid to them on the youngest coming of the age of 25 years. Provided, nevertheless, that each one on coming to the age of 25 years receive a portion of not more than ½ what their share will be on the youngest coming of age." Directions as to management of estate then follow; and the Testator proceeds:—"When the books so audited show the revenue of my said estate after paying [certain charges] amounts to £500, that ½ of such revenue or income be divided share and share alike between the families of my son J. C. and the family of my daughter A. J. B., and the other ½ [go into the general estate]."

Held, (i) that the proper construction of this clause was that the children of J. C. and A. J. B. took *per capita* and not *per stirpes*. (ii) That when the eldest became of the age of 25 years he was entitled to half of his share, that payment could not then be delayed; and that date must therefore be taken at the period, at which those who were to take are to be ascertained. Any child born before that period would be entitled to share; but any born afterwards would be excluded. (iii) The children did not take vested interests, the gift being contingent upon their attaining 25 years, which is the age at which they each become entitled to an arrangement as to their shares. (iv) The trustees can charge the shares of those overpaid with the excess of such payment.

W. Mortimer Clark, for plaintiff.

Ferguson, Q.C., Hoskin, Q.C., Boyd, Q.C., (with him, *Ewart*), and *Moss*, for defendants.

[13TH MAY, 1881.

GILCHRIST v. WILEY & WILSON.

Demurrer—Equitable Garnishment.

The plaintiff, a judgment creditor, filed his bill, alleging that the defendant Wiley, the judgment debtor, being the owner of lands subject to

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mortgage, conspired with his co-defendant, whereby a second mortgage was executed by Wiley to one A., who paid the money to the defendant Wilson, who held it as agent or trustee for Wiley. The lands were sold in a suit by the prior mortgagee, and realized enough only to pay the two mortgages. The plaintiff proved in that suit on his judgment in the Master's Office, but received nothing. He alleged that he had been led to believe that the mortgage to A. was *bona fide*. He prayed that the defendant Wilson should be ordered to pay the amount paid out of the proceeds of the lands to satisfy the A. mortgage.

Held, that the bill was merely one to garnish the amount in the hands of Wilson due to the defendant Wiley, and, under the authority of *Horsley* v. *Cox*, L. R. 4 Chy. 92; *St. Michael's College* v. *Merrick*, 1 App. R. 520, 536, 544; and 26 Gr. 216, could not be sustained.

Moss, for Plaintiff.

Reeve, for defendants.

[THE CHANCELLOR, 18TH MAY, 1881.

FENELON FALLS v. THE VICTORIA RAILWAY COMPANY.

Demurrer—Municipality—Railway Act—Trespass.

The plaintiffs, a Municipal Corporation filed their bill, to restrain the defendant Company from trespassing, by running their track along one of the streets of the Municipality without consent of the latter, and so impeding traffic thereon, in contravention of the Railway Act. C. S. C., cap. 66, sec. 12, s-s. 1.

Held, that, by virtue of the Municipal Act, there is such power of management and control, etc., bestowed upon municipalities, and such a responsibility cast upon them, as to justify them in intervening on behalf of the inhabitants for the preservation of their rights.

Semble, but for the language of Spragge, V.C., 4 Gr. 656, where he says, "I think that the suit is not improperly constituted," that the proper form of the suit would have been by way of information in the name of the Attorney-General, with the Corporation as relators.

Cattanach, for demurrer.

Hodgins, Q.C., contra.

McLELLAN v. McLELLAN.

Will, construction of—Dower—Election.

A Testator devised "to my son D. all my right, title and interest in and to the farm lot, and all implements thereon, * * at the death of my wife as aforesaid, on condition that he shall provide for her the necessary

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comforts and supplies for her board and maintenance, he, my son D., holding possession of the land from the time of my decease subject to the proviso aforesaid."

Held, that the widow was put to her election; for, the occupation by her as Dowress of one-third, would be clearly inconsistent with the possession of the son, given him by the will; and the testator by making that possession and devise conditional upon his supporting the widow, intended that she should give up the possession to the son.

Moss, for plaintiff.

Plumb, for infant defendants.

[PROUDFOOT, V.C., 16TH MAY, 1881.

HATHAWAY v. DOIG.

Nuisance—Interlocutory Injunction.

The plaintiff, residing with his wife, who owned the house close beside the defendant's manufactory, filed his bill to restrain the latter from carrying on his business of riveting boilers, etc., in such a way as to cause a nuisance to the plaintiff. The business was a very noisy one, and numerous affidavits were filed in support of and against this application for an interlocutory injunction, which, though conflicting, showed, in the opinion of the Court, that the carrying on of the business in the present way was a nuisance, the noise being unbearable, and producing ill health in the plaintiff's wife. For the defendant, it was objected that the plaintiff, on such a motion, must show irreparable injury; that the delay from February to April in proceeding was such as to disentitle the plaintiff to an interlocutory injunction, as he might have got down to the Spring Sittings at Toronto, if he had proceeded to order; that the nuisance, if one at all, was a public nuisance; that the plaintiff had not a sufficient interest in the land of his wife to entitle him to sue; that, as between the plaintiff and the defendant, the balance of convenience was in favour of the plaintiff's removing his residence rather than the defendant's stopping his business.

Held, that none of these objections were entitled to prevail; for that a *prima facie* case of real or apprehended injury was sufficient on this application; that it appeared from the evidence that the nuisance reached its present height only in April; and the plaintiff met the latter objection by offering to turn the motion into one for a decree; that the plaintiff suffering private injury had a right to move even if it were a public nuisance; that the plaintiff, who was entitled to occupy his wife's house, had a sufficient interest to file this bill; and that the balance of convenience could not be pushed so far as to drive a man from his home.

Blake, Q.C., and *Moss* (with them, *W. Barwick*), for plaintiff.

McCarthy, Q.C., and *Maclennan, Q.C.*, (with them *J. H. Ferguson*), for defendant.

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[SPRAGGE, C. J. O.,* 21ST MAY, 1881.

ROSS v. POMROY.

Statutes of Limitations, R. S. O. cap. 108.

The plaintiff, administrator of a mortgagee, filed his bill against the mortgagor on or before 20th October, 1864. After service and on 15th November, 1864, an arrangement was entered into between the parties, whereby the plaintiff took notes for the mortgage money, the first payable 1st June, 1866, and the others in the six following years. Proceedings on the mortgage were then suspended. Pomroy made a payment in June, 1867, and died 16th July, 1869. The notes were not paid. The suit was then, on 29th August, 1879, revived against the infant heir of the mortgagor.

Held, that the plaintiff was barred by R. S. O. cap. 108, sec. 23; but in case of the plaintiff's desiring to obtain the fruits of a judgment recovered against Pomroy, the bill was retained as against the infant defendant, as he would be a proper party in a proceeding against Pomroy's personal representative.

Maclennan, Q.C., for plaintiff.

Plumb, for defendant.

MOORE v. BUCHNER.

Arbitration and award—Jurisdiction—Time for enforcing award—Costs.

Bill to enforce an award. The defendant by answer submitted to the Court a number of matters as objections to the award, and asked a reference back to the arbitrator with certain instructions or a reference to the Master as to the matters in dispute. At the hearing on Bill and Answer, the defendant objected (i) to the jurisdiction of this Court, the submission providing that the submission and award should be made a rule of the Q. B. or C. P.; (ii) that the filing of the Bill was premature, the time for moving against the award not having expired.

Held, that a proceeding to enforce an award must be taken after the time for moving against it has elapsed.

Held, also that the objection to the jurisdiction would have prevailed if properly taken, as the parties to the submission had agreed upon their forum; but the defendant, having submitted to the jurisdiction by his answer and himself asked the intervention of the Court, could not now be heard to object.

It appearing that there was no reason for filing a bill instead of proceeding in the usual way,

Held, that the plaintiff was entitled only to such costs, as he would have been entitled to if he had proceeded to enforce the award under the Statute.

McClive, for plaintiff.

Plumb, for defendant.

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*These judgments are upon cases heard before His Lordship, when Chancellor.

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SANSON v. NORTHERN RAILWAY CO.

Nuisance—Injunction—Acquiescence.

The plaintiff was owner of a steam vessel, plying on Lake Couchiching, and accustomed to run into the River Severn where it leaves the lake, and to lie in a basin beside a wharf at Washago. The defendants, in extending their line of railway, constructed a bridge across the river, which totally obstructed the entrance, and caused special damage to the plaintiff, who was obliged to moor his boat in a basin on the lake side of the bridge, which was somewhat too small for its intended purposes Some correspondence took place, while the bridge was being built, between the plaintiff personally and through his Solicitor, and the defendants' General Manager, in the nature of protests; but the bridge had been in use for several years, without action on the part of the plaintiff, when this bill was filed praying that it might be declared a nuisance, and that the defendant might be ordered to abate it.

Held, that by the delay in taking action, and otherwise, there had been unequivocal acquiescence in the defendants' action; and the bill was therefore dismissed with costs.

McCarthy, *Q.C.*, (with him, *Pepler*), for plaintiff.

Boulton, (with him, *W. Cassels*), for defendants.

WATSON v. DOUSER *et al.*

Mortgage—Priority.

C., being the equitable owner of land, contracted by writing, registered, to sell to the defendant on 13th February, 1877. Part of the purchase money was paid down. C. obtained a vesting order on 17th April, 1878, vesting the land in him. There were two mortgages prior on the register to the loan company's mortgage hereafter mentioned. On the 17th May the defendant gave an order on the loan company to pay the proceeds of the loan to their agent. The latter was informed by one J., who had control of the two prior mortgages, that they were paid off, and that he would get them discharged; whereupon the agent paid C. the balance of his unpaid purchase money; and C., 25th May, 1878, conveyed to defendant. The loan company's mortgage was dated the 15th May and registered the 25th May.

Held, on appeal from the Master affirming his Report, that the loan company could not stand in C.'s place and claim priority on his lien for unpaid purchase money over the prior mortgagees; following *Imperial L. & S. Co.* v. *O'Sullivan*, 8 *Pr. R.* 162.

The loan company's mortgage contained this clause:—"And it is hereby declared that in case the company satisfies any charge on the lands, the amount paid shall be payable forthwith with interest, and in default the

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power of sale hereby given shall be exercisable, and in the event of the money hereby advanced, or any part thereof being applied to the payment of any charge or incumbrance, the company shall stand in the position and be entitled to all the equities of the person or persons so paid off."

Held, that this provision could not affect prior mortgagees who were no parties to it; and *quære*, whether it would apply to the discharge of unpaid purchase money which does not constitute a charge or incumbrance in the proper meaning of those terms.

Moss, for appellants.

Boyd, *Q.C.*, contra.

NELLES v. WHITE & O'NEIL.

Tax sale—Assessment, validity of—Description—Certificate of sale, effect of —Possession fraudulently obtained.

A parcel of land, called lot one in one survey, and lot four in another, was assessed variously as "1, 4," "1 and 4," "1 and pt. 4," "pt. 1 and 4," which however did not mislead.

Held, that, though these irregularities indicated want of care and accuracy in the officers of the Municipality, they did not invalidate the assessment, as the land was sufficiently pointed out. *McKay* v. *Chrysler*, 3 S. C. R. 474, distinguished.

Held, also, that the words "be the same more or less," following the description of the quantity of land, improperly inserted in the Sheriff's deed, might be rejected as surplusage.

A Sheriff's certificate of the sale is made for the purpose of giving the purchaser certain rights, in order to the protection of the property, until it is redeemed or becomes his absolutely, and forms no part of his title, and its absence does not invalidate the Sheriff's deed.

The plaintiff was assignee in Insolvency of H., who bought from the purchaser at the Sheriff's sale. H. leased to, and put T. in possession, and had some small buildings put on the land. Subsequently, the defendant O. made untrue representations to T., which induced him to quit possession, whereupon O. went in and occupied, claiming under defendant W., who, he alleged, had an interest in the land. W. by his answer adopted O.'s possession and claimed under conveyance from the Crown, but failed to prove his title.

Held, following *Doe Johnson* v. *Baytum*, 3 A. & E. 188, that the possession so fraudulently obtained by O. did not entitle him to put the plaintiff upon proof of his title.

Boyd, *Q.C.*, (with him, *Kew*), for plaintiff.

S. White and *Gibbons*, for defendants.

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SMITH v. THE MERCHANTS' BANK.

Warehouseman—Warehouse receipt—Acquirement by Bank directly—Power of Federal Parliament—Mixture.

W. S., a member of a firm engaged in the business of buying and selling coal, was lessee of a wharf, where the coal belonging to his firm was stored. Other articles had been stored there.

Held, that he was sufficiently qualified under 34 Vict., cap. 5, sec. 46, to give a warehouse receipt upon such coal.

Under 22 Vict., cap. 20, a warehouse receipt could be taken by a bank by indorsement only; but by 34 Vict., cap. 5 (D), a bank may take one directly.

The provisions of the 34 Vict., cap. 5, relating to warehouse receipts do not invade the functions of the Provincial Legislature, by an interference with "property and civil rights" in the Province.

Two of the warehouse receipts stated that the coal was in sheds, and two others that it was in bins, "separate from and will be kept distinguishable from other coal." Other coal was received during the year and was mixed with the coal under warehouse receipt. The quantity in store at the time of the firm's insolvency was less than the quantity there at the time of the receipt.

Held, that the plaintiff, the assignee in insolvency, could be in no better position than the insolvent as against the Bank, and that the Bank were entitled to any coal of the description specified in the warehouse receipts that might be found in the warehouse.

McCarthy, *Q.C.*, (with him, *Kingsford*), for plaintiff.

Robinson, *Q.C.*, (with him, *J. F. Smith*), for defendants.

Common Law Chambers.

[HAGARTY, C.J., APRIL, 1881.

REGINA *ex rel.* GRANT v. COLEMAN.
REGINA *ex rel.* DWYRE v. LEWIS.

Quo Warranto—Municipal Election—County Court Judge—Jurisdiction.

A County Court Judge directed the issue of writs of *quo warranto* returnable before himself to test the validity of the election of certain aldermen of the City of Ottawa. Before appearance, he set aside all proceedings with costs, on certain exceptions to the writs being taken before him.

Held, on an application for a mandamus to compel him to try the cases, that he had power to set aside the writs; and that his powers under the Municipal Act, being co-extensive with those of a Superior Court Judge in such cases, there was no appeal from his decision.

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[9TH MAY, 1881.

WOODRUFF v. CANADA GUARANTEE CO.

Consent Verdict—Interest.

In an action on a bond of indemnity, it was agreed at the trial that the plaintiff should have a verdict for $700, subject to a question of law which was afterwards decided in the plaintiff's favour.

Held, that the plaintiff was not entitled to interest on his verdict under R. S. O., cap. 50, sec. 269.

In re McCRAKEN v. CRESWICK.

[14TH MAY, 1881.

Division Courts Act 1880—*Prohibition—Jurisdiction—Interest —Promissory note.*

Plaintiff sued on a promissory note for $73.14 dated 1st April 1875, payable six weeks after date, with interest at seven per cent. The principal and interest together amounted to $103.44.

Held, that under the Division Courts Act, 1880, the amount having been ascertained by the signature of the defendant, the plaintiff was entitled to recover interest as legally incident to the debt, in the Division Court.

Holman, for plaintiff.

Perdue, for defendant.

In re DRINKWATER v. CLARRIDGE.

[20TH MAY, 1881.

Division Court—Negociable instrument—Judgment—Mandamus.

In a suit in a Division Court upon a negociable instrument, where the defendant does not dispute the claim, the plaintiff is entitled to enter judgment for the amount claimed, without the production or filing of the instrument sued upon.

Stonehouse, for plaintiff.

Perdue, for the Division Court Clerk.

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THE

CANADIAN LAW TIMES.

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PROBATE FEES AND EQUITABLE CONVERSION.

INQUIRY has elicited the information that, when wills are propounded before them, it is the practice, in a large number of the Surrogate Courts of this Province, to exact probate fees in respect of real estate which is by the testamentary instrument directed to be converted into personalty; in view of which fact, the subject of this paper becomes of interest, as well from a practical, as from a theoretical standpoint. We propose to consider what foundation there is in law for the practice which is believed to prevail, and how far the doctrine of equitable conversion may legitimately be applied for the purpose of imposing such fees.

As a preliminary to these considerations, it will prove instructive to inquire into the origin of the Court of Probate and its jurisdiction in matters testamentary, and into the necessity that exists for seeking the aid of that Court, since a clear understanding of these matters will aid us in determining upon the principal question.

There has been much learned controversy as to whether, in the days of our national infancy, the right to the administration of the personal estate of a deceased intestate belonged to the king, or the clergy, or the lord of the manor wherein the intestate died (*a*). One of the most frequently

(*a*) See Bacon's Abr. Exors. (E); 2 Fonblanque's Eq. 311, note [a]; *Dyke* v. *Walford*, 5 Moore P. C. 434; Comyn's Digest, Administrator A.

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quoted opinions is that set forth in *Hensloe's* case (*b*), where it is stated that "in ancient times, as appears by record, when a man died intestate, and had made no disposition of his goods, nor committed his trust to any, in such case the king, who is *parens patriæ*, and has the supreme care to provide for all his subjects, that every one should enjoy that which he ought to have, used by his ministers to seize the goods of the intestate, to the intent that they should be preserved and disposed of for the burial of the deceased, for payment of his debts, to advance his wife and children, if he had any, and if not, then those of his blood. * * * * And afterwards this care and trust was committed to the Ordinaries, for none could be found more fit to have such care and charge of his transitory goods, after the death of the intestate, than the Ordinary who all his life had the care and charge of his immortal soul."

Whether this be a correct account or not is an interesting question for the student of historical jurisprudence; and whether the reason for handing over the administration to the Ordinary is a relation of fact or a grim judicial joke, may be of interest to those whose delight it is to seek out the true inwardness of things, but neither of these questions becomes material for the purposes of this article. It is sufficient for our purpose to know that, at any rate, as early as the reign of Henry II., the ecclesiastical courts presided over by the ordinary (*c*), who was usually a bishop, had acquired exclusive jurisdiction in matters testamentary (*d*), the reason for this being, as we are told, "because it is to be intended that spiritual men have better consciences than laymen, and that they have more knowledge of what thing is for the profit and benefit of the soul of the testator than laymen have; and that they will look more than laymen

(*b*) 9 Rep. 39 a.

(*c*) i. e., he that hath ordinary jurisdiction in the place in matters ecclesiastical; Co. Litt. 96 a.

(*d*) Bacon's Abr. Exors. (E) 1, note d; 2 Fonblanque's Equity 312, note b.

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that the debts of the deceased be paid and satisfied out of his goods, and that they will see his will performed also so far as his goods will extend (*e*).

It was indeed desirable that so important a trust should be committed to persons having a delicate sense of moral rectitude, for although, as we have seen it is stated in *Hensloe's* case, that the king used originally to seize the goods of the intestate, for the purpose, among other things, of paying his debts and advancing his wife and children, yet we find that when jurisdiction in these matters came to be exercised wholly by the spiritual courts, or Courts Christian, as they were called, neither the wife nor children of the deceased occupied the position of *cestuis que trustent*, notwithstanding that the goods were held by the Ordinary as trust property (*f*), and not for his own use, but they were wholly dependent upon the conscience of the Ordinary, for we are told that, "If a man died intestate, neither his wife, child, or next of kin had any right to a share of his estate, but the Ordinary was to distribute it, according to his conscience, to pious uses; and sometimes the wife and children might be amongst the number of those whom he appointed to receive it; but however the law trusted him with the sole disposition" (*g*).

A creditor of the deceased had at Common Law a right to payment of his claim out of the personalty come to the hands of the Ordinary (*h*), but, in course of time, it appears to have become necessary to administer a gentle corrective to the conscience of the Ordinary, by crystallizing this Common Law right into a statutory provision, which was accordingly done by the Statute, West. 2, cap. 19 (*i*), by giving the creditors of the deceased a right of action

(*e*) Perkins on Conveyancing (15th Ed.), sec. 486.

(*f*) 2 Just. 398.

(*g*) Bacon's Abr. Exors. E. 1, p. 398. The ordinary never had any claim to anything beyond the goods within his own jurisdiction.—*Atty.-Genl.* v. *Hope*, 2 Cl. & F. 91; *Atty.-Genl.* v. *Brunning*, 8 H. L. C. 255.

(*h*) 2 Just. 397; *Hensloe's* case, 9 Co. 39 b; *Snelling's* case, 5 Co. 83 a.

(*i*) 13 Ed. I cap. 19.

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against the Ordinary, who, however, as to the balance of the personal estate, after payment of debts, retained a practically unlimited discretionary power.

The casual advantages that would accrue to the ordinary, in the course of the administration of an intestate's estate, are too apparent to need comment, especially when we remember the fact that a certain portion of the goods was, as a matter of right, supposed to be divided between the church and the poor; and that it did not require a conscience more elastic than was permitted by the usage of the times, for the Ordinary to treat himself as the beneficiary representative of each of those objects of charity.

Blackstone tells us that "With us the power of bequeathing moveables is co-eval with the first rudiments of law; for we have no traces or memorials of any time when it did not exist" (*j*).

Since the making of a will deprived the Ordinary of his right of administration, it followed as a matter of course that he was entitled to proof of the making thereof, "for it was thought just and natural that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby" (*k*). Originally, therefore, the sole necessity for proving a will arose from the necessity for satisfying the Ordinary that he was not entitled to the personalty devolving thereunder.

A most important inroad upon these privileges of the clergy was made by the Statute, 31 Ed. III. cap. 11, passed possibly for the purpose of removing from their consciences the too severe tension to which they had been subjected. This Statute provides that where a man dies intestate, the Ordinary shall depute the next and most lawful friends of the deceased to administer his goods, who shall have an

(*j*) 2 Bl. Com. 491.
(*k*) 2 Bl. Com. 494. See *Attorney-General* v. *Hope*, 2 Cl. & F. 91.

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action to demand and recover his debts as executors and to dispend for his soul, and shall be accountable as executors. Upon this footing, varied by certain statutory regulations, stood the jurisdiction of the ecclesiastical Courts, in matters testamentary, until the passing of the Imperial Statute, 20 & 21 Vict. cap. 77, whereby was created the English "Court of Probate." A Court of Probate was created in this Province by a Statute of the first Parliament of Upper Canada (*l*), which Court, for all the purposes for which it was constituted, administered the law of the English Ecclesiastical Courts of 1793 (*m*). This Court continued to exercise its jurisdiction down to the year 1858, when it was abolished, and a Surrogate Court established in each county, with all the powers of the old Court of Probate (*n*). Probate duty was exacted by the Ordinary, when a will was propounded before him, and this was allowed to him in payment for the prayers, which he was wont to offer for the soul of the deceased (*o*). There appears to have existed a difference of opinion between the laity and the clergy as to the market value of these prayers, for we find in the Statute, 31 Ed. III. st. 1, cap. 4, a recital that "the ministers of bishops and other Ordinaries of holy church take of the people grievous and outrageous fine for the probate of testaments and for the making of acquittances thereof," and the Statute thereupon charges the Archbishop of Canterbury and the other bishops that they cause the same to be amended; and if they do not, it is accorded that the king shall cause to be inquired by his justices of such oppressions and extortions, to hear them and determine them, as well at the king's suit as at the suit of the party as in old time hath been used. It further appears by the recitals to the Statute, 21 Hen. VIII. cap. 5, that the Ordinaries, instead of decreasing their fees, had increased them to twelve or fifteen times as much as

(*l*) 33 Geo. III. cap. 8.
(*m*) *Grant* v. *G. W. Ry.*, 7 C. P. 438.
(*n*) 22 Vict. cap. 93; R. S. O. cap. 46.
(*o*) Per Ld. Chr. Brougham, *Attorney-General* v. *Hope*, 2 Cl. & F. 88.

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had been exacted in the time of Edward III. This Statute was the first to provide a graduated and fixed scale for the payment of probate duty. The Imperial Statute, which now regulates the payment of probate duty in England, is that of 55 Geo. III. cap. 184. To this Act is annexed a schedule, which is made part of the Act, and which provides for payment of probate duty upon "the estate and effects for or in respect of which such probate, letters of administration, etc., shall be granted." "In order to render property liable to probate duty, it must, at the time of the owner's death, be capable of being received or recovered by his executor or administrator *virtute officii* (*p*), and independently of any special direction. In other words, it must either be in itself of a personal character, as goods, chattel and credits of the deceased, or it must have had that character absolutely impressed upon it in his life-time" (*q*). Probate duty in this Province is levied under the Surrogate Courts Act (*r*), Schedule B to which Act provides for payment of duty upon the "*property devolving*" in respect of which the grant of probate or administration shall be made. This, it will be seen, is practically the same as the Imperial Act already referred to; and the cases decided under that Act in so far as they affect the subject of this paper are applicable for the purpose of construing our own Act. Before proceeding to consider such of these cases as may serve to throw light upon the question in hand, we may remark that, as Legacy and Succession Duties have a separate modern statutory origin and are unknown to us in this Province, we must, in looking at the English authorities, bear carefully in mind the distinction between these duties and those levied in respect of probate and administration. Bearing this in mind, the cases respecting legacy and succession duties will be of assistance

(*p*) That is, which he would have had a right to receive if the testator had merely appointed him executor, without saying anything about the property or the application thereof. *Cook* v. *Gregson*, 3 Drew. 547.

(*q*) Hanson on Probate Duty, 7. See Dodd & Brooks' Probate Practice, 564, note b.

(*r*) R. S. O. cap. 46.

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in considering so much of the doctrine of equitable conversion as we have mapped out for ourselves (*s*).

Probate duty is payable according to the character of the property at the time of the death of the testator, while legacy duty is payable according to what the legatee gets (*t*); that is, a conversion, which is directed by the will only, is effectual to determine the character of the property for the purpose of levying *legacy* or *succession duty* and determining which of these duties is properly chargeable, but such a conversion in no way affects the question whether *probate* duty is chargeable or not. It may prevent some confusion in reading the English cases, if we remember that the schedule attached to the Imperial Statute, 55 Geo. III. cap. 184, by which legacy duty is imposed, renders such duty payable among other cases, on legacies given by will, either out of personal estate or *out of or charged upon real estate or out of any moneys to arise by the sale, mortgage or other disposition of real estate;* and the Imperial Act, 16 & 17 Vict. cap. 51, imposes upon real property and settled personal estate accruing to any person by reason of death, a succession duty equal to the duty imposed upon legacies at the time of the passing of the Act. We will submit two propositions: the first of which we believe is, at least, supported by authority, while the second is supported by both authority and principle.

I. The Surrogate Courts of this Province should, for fiscal purposes, give effect to the equitable doctrine of conversion, where, upon the application of that doctrine, the notional conversion takes place before the death of the owner of the property, whose personal representative is called upon for payment of probate duty.

II. Upon the construction of the Act imposing probate duty in this Province, a conversion, which is directed by

(*s*) See *Drake* v. *The Attorney-General*, 10 Cl. & F. 257.
(*t*) *Forbes* v. *Steven*, L. R. 10 Eq. 185.

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the will itself, can in no way affect any question that may arise as to the probate duty payable in respect of the property devolving under the will.

I.

Upon examining the authorities, it will be seen that our first proposition is by no means free from doubt; and although, we believe, that the balance of modern authority is in favour of the proposition, we may perhaps be pardoned for thinking that the weight of reason is in favor of an opposite view. The point appears to have first arisen for decision under the English practice in the case of *Matson* v. *Swift* (*u*), decided by Lord Langdale, M.R., in 1845. In that case a testator had *conveyed* his real estate, upon trust to sell and pay certain debts and hand over the residue to himself, his executors, administrators or assigns, without any equity thereon in favor of his heirs or real representatives, notwithstanding the estate might remain unconverted at the time of his death. The trusts were not carried out until after his death, and the Crown claimed to be entitled to probate duty on his will in respect of the said residue, upon application of the equitable doctrine of conversion. His Lordship, in explaining the effect and limitation of that doctrine, says that "What is meant is that for the purposes plainly contemplated by the owner, or necessary for the accomplishment of his apparent intention, and to give effect to the rights he expressly or by implication means to confer, the Court will declare or impute trusts, and under the execution of such trusts will distribute the property as if it were personalty" (*v*). He then points out that where the real estate is not in fact altered at the time of the owner's death, "Equity considers not what might have been done, but what ought to be done, and will declare or act upon the trusts which are required for the purpose of making the actual conversion,

(*u*) 8 Beav. 368.
(*v*) *Matson* v. *Swift*, 8 Beav. 374.

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at the instance only of those who show themselves entitled to the benefit of such trusts. And we may reasonably ask the question whether, after a conveyance of land in trust to sell, or after valid contracts for the sale of land, and the death of the legal owner, the Crown can be entitled, for its own purposes only, to enforce the equities between the parties? If the parties should release each other, could the Crown, for purposes merely fiscal, not in the contemplation of any party, be entitled to the benefit of the trusts which are declared or acted upon only for the purpose of giving effect to the intention of the parties?" His Lordship answered both these questions in the negative.

This language is fully approved of in *Re De Lancey* (*w*), decided in 1870, where Bovill, C.J., in delivering the judgment of the Court of Exchequer Chamber, confirming the judgment of the Court of Exchequer, says, with reference to the doctrine of conversion, "Indeed, the true limitation of the principle is stated so clearly by Lord Langdale, and is in itself so reasonable, that I cannot suppose any Court would interfere with it." The same learned Judge, in the same case, says: "Equity does not alter the character of the property, but the nature of the title to it." *Matson* v. *Smith*, already mentioned, and *Custance* v. *Bradshaw* (*x*), decided by V. C. Wigram in 1845, may fairly be called twin cases; the same question arose in each of them contemporaneously, and it does not require the intimation to that effect, made in the judgment in the latter case, to convince us that the two learned Judges consulted together, as that is sufficiently evidenced by the identity of the line of argument taken in the two cases.

In the latter case, the question arose whether probate duty was payable in respect of the share of a deceased partner in lands which had been held by a partnership for partnership purposes, and it was held that it was not so

(*w*) L. R. 5 Ex. 108.
(*x*) 4 Hare 324.

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payable, on the ground that "equity would not alter the nature of the property, for the purpose only of subjecting it to fiscal claims, to which at law it was not liable in its existing state." To the same effect is the opinion of Kelly, C.B., who says that "the doctrine that money to be laid out in land is to be treated as land, though long established in Courts of Equity, is in truth a mere fiction and no more, and founded upon what Lord Thurlow, in *Pulteney* v. *The Earl of Darlington*, called 'the cant expression that in equity what is to be done is considered as done' (1 Brown Ch. Cas. 237)" (*y*). Then, after limiting the application of the doctrine in much the same manner as is done by Lord Langdale, he adds: "I am of opinion, therefore, that the principle or equitable fiction upon which courts of equity have so long held that money to be laid out in land is for certain purposes to be treated as land, is inapplicable to the interpretation of the Statute imposing duties upon personal estate." This is a formidable array of opinions in opposition to our first proposition; and when we remember the origin of the right to probate duty and of the ecclesiastical jurisdiction in testamentary matters, that probate duty is payable only in respect of the personal property which, in olden times, was wont to be seized by the Ordinary, and that the equitable doctrine of conversion is a refinement that was undreamed of in English law in the days when the Ecclesiastical Courts first acquired their jurisdiction in matters testamentary (*z*), we are inclined to believe that the opinions cited, in so far, at least, as they apply to the question of probate duty, are good law. We must now, however, refer to the cases in support of our proposition, the most important of which is that of *The Attorney-General* v. *Brunning* (*a*), decided by the House of Lords in 1860. In this case the testator had in his life-time entered

(*y*) *Re De Lancey*, L. R. 4 Ex. 358—Per Kelly, C.B.

(*z*) See Spence's Equitable Jurisdiction of the Court of Chancery, vol. I., pt. 2, cap. 3; and see note *b*, page 334, showing that at the time when the Ecclesiastical Court acquired testamentary jurisdiction there was no Court of Equity in England.

(*a*) 8 H. L. C. 243.

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into a contract for the sale of land, which, at the time of his death, was a binding contract, subject to the approval of the Court of Chancery on behalf of the purchaser, who was a ward of Court; and after his death the contract was approved of by the Court. It was held that the purchase money was part of the "estate and effects" in respect of which probate was granted, and that it was therefore liable to probate duty. As a decision of the Court of last resort, not only is this case a binding authority upon the exact question there in issue, but the course of reasoning which lead to the judgment is also entitled to the very highest respect, and would probably be adopted by all inferior Courts.

Lord Campbell, in the course of his judgment, states one ground upon which the whole judgment might well have stood and have in no way conflicted with the cases already cited, he says:—"The purchase money having been actually paid to the executor, it is wholly immaterial whether in case of non-payment the remedy was by action at law or bill in equity or by a summary petition. Probate is granted of the property of the testator, within the jurisdiction of the Ordinary, which the testator is entitled to receive as executor. This purchase money the executor was entitled to receive and did receive as executor" (*b*). His Lordship, however, bases his judgment upon the more general ground that the doctrine of conversion is applicable as well for fiscal purposes as for marking out the course of devolution of the property, and he expresses the opinion that, where necessary, the Ordinary could have called in the aid of a Court of Equity as well as of a Court of Law; and this ground of decision appears to have been concurred in by all the lords.

Following this case comes that of *Forbes* v. *Steven* (*c*), decided by V. C. James in 1870. This was a case where duty was held to be chargeable in respect of the share of a

(*b*) 8 H. L. C. 255.
(*c*) L. R. 10 Eq. 178.

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deceased partner in the proceeds of freehold property, which had been used for the purposes of the partnership and formed a partnership asset. The judgment proceeded upon the ground that lands purchased with partnership funds for partnership purposes were thereby converted into personalty, and the learned Judge indicates the only ground upon which, in his opinion, the case of *Custance* v. *Bradshaw* can be supported. He points out that the nature of the conveyances of the land in question in that case were such that there was no conversion, and he adds: "It was competent to them to say, and they did say, that, although they were bought for partnership purposes, they were not to be treated as partnership assets to be realized, but that subject to the joint power of appointment, each partner was to have, as his own separate real estate, an undivided share in the specific thing itself" (*d*).

The latest authority in support of our first proposition is *Attorney-General* v. *Lomas* (*e*), decided in 1873. Kelly, C.B., in delivering the judgment of the Court, says: "Whatever doubt may have occurred on the point has been set at rest by a series of decisions, which have been uniformly to the effect that when real property is expressly directed by will to be sold, and the proceeds are with the personalty to form one fund, the land, though unsold at the time when any person entitled to the interest in the joint fund dies, is nevertheless to be treated as money for the purpose of probate duty."

II.

We believe that our second proposition admits of no doubt. In the first place, it is supported by the whole array of authorities which are adverse to our first proposition, and every argument against that proposition must be in support of this. And, in the next place, it is virtually sustained by the authorities upon which the first proposition is based, inasmuch as those authorities treat the

(*d*) L. R. 10 Eq. 191.
(*e*) L. R. 9 Ex. 29.

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cases of *Matson* v. *Swift* and *Custance* v. *Bradshaw* as capable of being supported on the ground that, giving full effect to the equitable doctrine, yet, a conversion out and out was not effected in either of those cases *before the death of the owner of the property.*

It is understood that reliance is placed upon *Attorney-General* v. *Lomas* as supporting the exaction mentioned at the beginning of this paper, but, upon examination, that case will be found to lend no support to such a charge. The material facts of that case are as follows:—A testator by his will directed that his real estate be converted, and the proceeds, with his personalty, held in trust for the payment of debts and legacies, and as to the residue on certain trusts which failed. The testator's heiress, by reason of the failure of the lastly mentioned trusts, became entitled to the proceeds of the real estate. She died, and at the time of her death, the real estate was unsold. It was held that the interest which she took, as heiress of the testator, was taken by her as money, and that probate duty *was payable by her administrator in respect of it.* Under the Imperial Act, the term probate duty is equally applicable to fees paid upon a grant of either probate or administration. It will be seen that this case falls within the rule laid down in our first proposition, and in no way conflicts with our second.

The full effect of the judgment in that case is stated by Kelly, C.B., as follows:—"If the land remains unconverted at the time when the heir who takes an undisposed of interest in it dies, and if there is nothing in the will making it necessary to convert it, it is taken as land, and devolves, according to the rules governing the descent of real estate; but when there is a legal obligation to sell, and the proceeds are to form a portion of a joint and single fund for the purposes of the will, then, whatever may be the condition of the property *at the time of the death of the heir taking the undisposed of interest,* it is, both for the

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purpose of devolution and for the purpose of probate duty, to be considered as money (*f*)."

The lords, in discussing the cases of *Custance* v. *Bradshaw* and *Matson* v. *Swift*, and stating the proper limitation of the doctrine of those cases, and the grounds upon which they could be supported, did, in effect, affirm those cases, to an extent sufficient to support our second proposition. Lord Cranworth says that Sir James Wigram, in *Custance* v. *Bradshaw*, proceeded upon the ground "that, at the death of the testator, the property in question was real estate, and that if it was ever to lose that quality, it would be by some act done after the testator's death, and which might never become necessary." And the same learned Judge, in stating the ground upon which *Matson* v. *Swift* may be supported, says: "The estate remained real estate at the death of the testator, and was only convertable into personalty by virtue of his direction; a direction, it is true, declared, not by the will, but by a previous deed, but which he might have revoked or varied by his will, if he had thought fit. And the conversion into personalty, therefore, may truly be treated as having depended on his will" (*g*). In the light of what has been said, we are now better able to understand the effect of the decision in *Attorney-General* v. *Brunning*, as summarised in the head note to that case:—"All moneys recoverable by the executor by virtue of the probate, in whatever form recovered, whether through the agency of a Court of Equity or of a Court of Law, are part of the estate and effects of the testator and are liable to probate duty" (*h*).

A. H. MARSH.

(*f*) L. R. 9 Ex. 34.
(*g*) *Attorney-General* v. *Brunning*, 8 H. L. C. 260.
(*h*) At p. 243.

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MORTGAGE OR NO MORTGAGE: ADMISSION OF PAROL EVIDENCE.

The great length and detail at which the above subject has been discussed by our Judges in a succession of cases, beginning with that of *Le Targe* v. *De Tuyll* (*a*), may be perhaps accounted for partly by the comparatively small amount of discussion devoted to the question by the English Judges and text writers, and partly by a sense of the special importance of the question in this country.

The latter fact was, at all events, adverted to by three of the Judges in *Matthews* v. *Holmes* (*b*) when that case came up in appeal, although the conclusions drawn are curiously divergent. Thus, at p. 27, Sir John Robinson says:—"It is particularly important in this country, and especially at the present time, that we should not be less cautious than courts of Equity are in England, in allowing conveyances of lands which are absolute on the face of them to be reduced to conditional conveyances, by accepting parol evidence to contradict the terms of a deed, and to alter entirely the position of the parties." He then observes that for some time past it had been common for English and Canadian creditors, though in many cases with reluctance, to accept lands at a valuation in payment of debts, when there was no hope of payment in money; that no doubt in many cases there was a confidence between the parties, where an absolute conveyance was executed, that the creditor would reconvey if the debtor should within a reasonable time pay the original debt with interest; but that "*where there has been no intimation of such an understanding inserted in the deed, and no memorandum in writing taken to that effect*, the probability is that in most of such cases it was not a matter of stipulation, but a mere reliance

(*a*) 1 Gr. 227 (1850).
(*b*) 5 Gr. 1 (1853).

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that the grantee would be found willing to do what he did not, in fact, in any manner bind himself or engage to do, and what he would have declined to bind himself to do, if he had been asked." He, then, goes on to observe that, during the last year or two, lands so made over to creditors had in many cases risen immensely in value from the operation of unlooked for causes, and that thus a great temptation was afforded to just such fraud and perjury as the Statute of Frauds was meant to protect people against. And in the same case, at p. 70, Macaulay, C.J., speaks very much to the same effect.

On the other hand, at p. 49, Blake, C., says:—"Not only has there been a habit here of taking absolute deeds with separate defeasances, but the still worse habit, pursued by the defendant, of taking an absolute deed without executing any defeasance, has prevailed very extensively; but so far from finding in that circumstance any ground for placing a more favourable construction upon the evidence of the lender, it appears to me to afford the strongest possible reason to require the utmost strictness of proof. It affords such latitude for harsh and oppressive conduct on the part of lenders, and this power has been so often used harshly and oppressively within my own experience, that I feel it to be an especial duty of a court of Equity in this country to guard the equity of redemption under such circumstances with peculiar care, to be jealous of presuming a release in favour of a lender who pursues so exceptionable a course." And he cites the language of Lord Talbot in *Cotterel* v. *Purchase* (*c*), which, he remarks, has the sanction of the ablest judges in Equity, and appears peculiarly applicable to this country. Lord Talbot says: "In the northern parts it is the custom in drawing mortgages to make an absolute deed with a defeasance separate from it, but I think it is a wrong way, and to me it will always appear with a face of fraud, for the defeasance may be lost, and then an absolute conveyance is set up I would discourage the practice as much as possible."

(*c*) Cas. Temp. Tal. 61 (1835).

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The more immediate cause, however, of the minuteness with which our Judges have discussed the question, has been the fact that in certain cases it has been maintained by counsel that the expressions of the English text-writers justified the assertion that in *all* cases parol evidence was admissible where the question was "mortgage or no mortgage," in spite of the deed in question undoubtedly purporting to be an absolute conveyance, and that American authority supported the same view.

In *Le Targe* v. *De Tuyll* (*d*), in which case the expressions of the text writers on this point first come under review, a reference is made to Fonblanque (*e*), where it is said: "Parol evidence is admissible to shew or explain the real intention and purpose of the parties though the conveyance be absolute:" and passages from other writers are cited in which equally broad statements are to be found. Indeed, in the last edition of Coote on Mortgages (*f*), it is asserted: "Equity will admit even parol evidence to shew the conveyance was intended by way of security only;" and there is nothing in the context to qualify this general language. In Fisher on Mortgages (*g*), the law is stated, as will presently be seen, in a manner more in harmony with the expressions of our Judges, but which is capable of receiving very much increased definiteness from a study of the judgments in the Canadian cases.

It will perhaps be the best plan to notice first the comments on the above-mentioned broad and misleading language of the text-writers contained in the Canadian cases, and the more correct way in which the general principles of the law on the subject are there stated, and then to consider how they illustrate its application in detail.

(*d*) Supra.
(*e*) Eq. 5th ed. 263, n.
(*f*) 1880.
(*g*) 3rd.ed., pp. 13-15.

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In *Le Targe* v. *De Tuyll* (*h*), the Chancellor remarks that although text-writers of deserved celebrity employ language which, if understood without qualification, seems unwarranted upon principle and unsustained by authority, yet the Court had nowhere found a decision in any English case affirming the position taken by the plaintiff, that parol evidence is always admissible without reference to circumstances upon the question, "mortgage or no mortgage." He observes, however, at p. 232 :—"But although we think that the law of England, by which we are governed, knows no distinction between mortgage and other contracts, in this respect, and that the question whether parol evidence should or should not be received, is to be solved on principles generally applicable; and although we feel clear that the evidence offered in this case could not be received without reference to the subsequent dealings of these parties, yet we are of opinion, that the peculiarities inherent in this kind of contract lead to results different from those at which we would arrive from the application of the same principles of law to contracts of a different nature; that the effect of this peculiarity, coupled with the subsequent dealings of the parties, is such as to render the parol evidence which has been taken admissible; and that upon that evidence the plaintiff is entitled to the relief he asks." Again, he says, at p. 235 :—"There is no rule of law to prevent these parties from acting upon that which is their real contract; and if, disregarding the written terms, they elect to act upon the real contract, if the one demand his debt and the other pay it, under such circumstances we think the Court should not permit a mortgagee to perpetrate a fraud so gross as would result, were he heard to insist upon the written instrument as the exclusive evidence of the actual contract."

In the next case on the subject, viz., *Barnhart* v. *Patterson* (*i*), Esten, V.C., who, it may be observed, is in

(*h*) Supra.
(*i*) 1 Gr. 459 (1850).

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his judgments as inclined to take a liberal view as to the admission of parol evidence in the cases under consideration as Sir John Robinson is to take a strict view, observes, at p. 469, that he is not aware that any adjudged case can be produced, showing that parol evidence is admissible in the abstract to prove that an absolute deed was intended only as a security, but expresses entire concurrence with the doctrine laid down in *Le Targe* v. *De Tuyll*, that "parol evidence is admissible to prove an absolute deed a mortgage in all cases of fraud, mistake, accident or surprise, or when subsequent dealings have taken place between the parties inconsistent with the fact of the deed being absolute, and causing a fraud to be committed on the mortgagor in case the evidence is excluded,"—though he remarks that he is not aware that *any other authority can be cited for the latter proposition than this case*. And the language of the same Judge, when this case came up on appeal, is to the same effect (*j*).

In *Stewart* v. *Horton* (*k*), where it was desired to show by parol evidence that a certain instrument, which in form was a conveyance with a right of re-purchase, was intended by the parties as a mortgage, Esten, V.C. again makes some observations which bear upon the present subject. He says (p. 55) that in questions as to whether an instrument is to operate *as a mortgage or a conditional sale*, parol evidence is always admissible, because to construe the instrument as a mortgage, and thereby to allow a redemption after the time appointed for the payment of the money, and the estate has become absolute at law, is to make an equitable implication contrary to the legal effect of the instrument, which implication may always be rebutted by parol evidence. But he goes further than this, and says that parol evidence was admissible in that case on another ground, viz., because "To accept an instrument as a security, and executed as such, and then to take advantage

(*j*) *Greenshields* v. *Barnhart*, 3 Gr. 689.
(*k*) 2 Gr. 45 (1850).

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of the form in which it was drawn up, by setting it up as a conditional sale, in the event become absolute, is a legal fraud, which admits the parol evidence, and entitles the plaintiff to relief upon the transaction as a mortgage. If, on the other hand, Mitchell (the grantee) did not receive the instrument under the agreement, but secretly nourished in his own mind a design of having the instrument drawn up in such a manner that it could be set up as an absolute conveyance, which is the only alternative supposition that can be joined, the fraud is of a still graver character."

Taking this language by itself, it seems calculated to mislead, and it may be well to anticipate a little by quoting here the words of Sir John Robinson, in the later case of *Matthews* v. *Holmes* (*l*), before the Court of Appeal. He observes, at p. 32:—"We cannot properly accede, I think, to the broad way in which it has been stated in argument, that parol evidence may always be received to vary or contradict a deed upon the question of mortgage or no mortgage, because the very question involves an inquiry into an imputed fraud. The argument seems to be this. Because it *would be* fraudulent in any man to set up a conveyance as absolute, which it was intended he should hold only as a security (though it was made absolute in its terms), therefore you are at liberty to shew by any kind of evidence, and without regard to what is contained in the seventh clause of the Statute of Frauds, that the grantee in the deed did verbally agree that his absolute conveyance should be acted upon and used by him only as a security. The reason of the thing, I think, lies the other way. The law does not presume that any man has acted or desires to act fraudulently, but presumes the contrary, until the fraud is shewn. . . . The statute was designed as a protection against fraud and perjury, and surely a party may say with truth that he is grievously injured if he is not only made to lose his estate upon parol evidence of an alleged trust, admitted contrary to the statute, but to lose his character

(*l*) 5 Gr. 1 (1853).

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with his estate, in consequence of the Court coming to a conclusion upon parol evidence that he has been guilty of a fraud in claiming a right to abide by his deed and in denying the parol evidence of an agreement inconsistent with it." But he adds:—"I confine this remark to cases where the deed is attacked only by parol evidence, and where none of those circumstances have been made to appear which in the view of courts of Equity have seemed to open the way to the reception of parol evidence as necessary for the purpose of ascertaining what was the real nature of the transaction, *after it has been made manifest by written evidence legally admissible, or by the conduct of the conduct or admission of the party*, that the transaction could not have been such as the deed represents it to have been."

Returning, however, to our review of the cases in their order, the next one to be considered is *Howland* v. *Stewart* (*m*), in appeal. Here *Le Turge* v. *De Tuyll* and many English and American cases are reviewed. The broad statements of the text-writers are also again referred to, and it is admitted that the expressions used by them when quoted or taken "abstractedly" from the context would seem to give some countenance to the view that in all cases where the question is "mortgage or no mortgage," parol evidence is admissible. But it is observed in the judgment of the Court delivered by Burns, J. (p. 65), that when the cases cited by these and other writers who use similar expressions are looked at, and when the comments of the text-writers are considered and compared with each other and with other passages of the same work, it is evident the proposition in the broad sense contended for in this case is not sustainable, neither do the writers intend that what is said should be received to such extent." On the contrary, the Court declares that the same general rule prevails in Equity as in law as to the reception of parol evidence "In both

(*m*) 2 Gr. 61 (1850).

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Courts," (p. 70), "where the principle to be decided is the same, the reception or rejection of evidence is also the same; but in cases of accident, mistake, or fraud, when the instruments are made to speak or operate differently from the intention and agreement of the parties, courts of law having no power to alter or read instruments differently than what appears upon their face, parties are driven to apply for relief to the Equity courts,and there the constant language is, 'Shew by something which does not depend upon parol evidence that there is reason to believe the instrument does not truly speak the agreement made, and then parol evidence will be received to shew what relief ought to be granted.' . . . We can discover no principle which applies to mortgage cases different from other cases, as to the reception of parol proofs, but in every case where parol evidence has been received, there has been something independent of the parol evidence to show the transaction different from what the deed expresses before the proof is let in, and then the evidence is receivable for the purpose of explaining the transaction."

The next case, which is *Papineau* v. *Gurd* (*n*), was decided on the principles laid down in *Le Targe* v. *De Tuyll* and *Barnhart* v. *Patterson*, and there is nothing in the judgment which appears to require further notice in this portion of our subject.

The next case in order of time, though not the next in the Reports, is that of *Greenshields* v. *Barnhart* (*o*), in which the decree in *Barnhart* v. *Patterson* came up in appeal. Five Judges delivered judgments, which together occupy one hundred and five pages of the report, and the admission of parol evidence is fully discussed. McLean, J., endorses the principle as laid down in *Le Targe* v. *De*

(*n*) 2 Gr. 512 (1851).
(*o*) 3 Gr. 1 (1851).

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Tuyll, and in *Howland* v. *Stewart*. Esten, V.C., supported his judgment in the Court below, and confirms the language of the Chancellor in *Le Targe* v. *De Tuyll* above quoted, by saying (p. 72):—"I am not prepared to say that there is any rule of law or evidence peculiarly applicable to mortgages as such; but it is, nevertheless, I think, perfectly true that it is scarcely possible to imagine a case of mortgage, effected through the medium of an absolute conveyance, in which, upon some well recognized principle of Equity, parol evidence would not be properly receivable for the purpose of explaining the true intent of the parties, and of carrying that intention into effect. If, indeed, the parties designedly omit a proviso for redemption for some particular purpose, the mortgagor, trusting to the honour of the mortgagee to permit such redemption when it should be asked, the Court can afford no assistance to a person who has intentionally represented the agreement as different from what it really was; but in every other case, if a proviso for redemption be not introduced into the deed, it must be through ignorance or mistake; and, in that case, it would be, of course, for the Court to reform the deed, which did not truly express the agreement of the parties, and in the same suit to treat, and act upon the deed as already reformed, and give the consequential relief." At p. 75, the learned V.C. refers to the broad language of the text-writers, and even seems to defend it, saying that these writers "doubtless state the understanding of the profession in England upon the subject, which is a matter of great importance. It is probable that the law is well understood in Westminster Hall on many points respecting which no adjudged case can be found, for the very reason that it is well understood and acknowledged." And he refers to two old cases of *re Gorey* (*p*) and *Reeks* v. *Postlewaite* (*q*), as seeming "to recognize and assume the admissibility of parol evidence for that purpose."

(*p*) 3 Salk. 241, pl. 2.
(*q*) Coop. 170.

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Spragge, V.C., merely observes (p. 92) that he concurs with the exposition of the law given by Esten, V.C., in the Court below, as containing a sound exposition thereof. Macaulay, C.J., begins by a concise statement of the existing rules as to the admission of parol evidence to vary written documents in courts of law and equity, and concludes (p. 50) that it was not competent for the grantor to prove by mere parol evidence that the assignment, though absolute in form, was only to operate as a security, and be redeemable, upon any other ground short of fraud, actual or presumed; "consequently it depends upon the consideration whether facts and circumstances *dehors* the assignments and not mere oral statements exist, and are shewn sufficient to raise the equity alleged, according to what I take to be the true principle as admirably expressed by L. C. B. Eyre, in *Davis* v. *Symonds* (*r*)."

This case of *Davis* v. *Symonds*, was for specific performance, and was brought by one joint purchaser against the vendor and his co-purchaser, to whom the vendor had, contrary to the contract, conveyed the estate. Amongst other defences it was urged that the real meaning of the agreement was that the defendant joint-purchaser should be the actual purchaser, and that the plaintiff should only have some interest in the premises by way of security for part of the purchase money advanced to his said joint-purchaser; and the defendants urged that they might read parol evidence to shew this. L. C. B. Eyre observes that this was a different case from that of admitting such evidence, where by reason of *circumstances dehors the agreement*, there arises an equity to make the Court say you shall only hold this as a security for money advanced. Here it was attempted to alter the agreement itself. This made it fall within "all the rules in which parol evidence has been holden to be inadmissible." He observes that at

(*r*) 1 Cox 402 (1787).

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Nisi Prius, when an agreement is spoken of, the first question always asked is, whether it is in writing; if so, there is an end of all parol evidence. He then says:—"In the case of a contract respecting land, this general idea receives weight from the circumstance that you cannot contract at all on that subject but in writing; and this, therefore, is a further reason for rejecting parol evidence. In this way only is the Statute of Frauds material, for the foundation and bottom of the objection are in the general rules of evidence. I take this rule to apply in every case where the question is *what* is the agreement? and this rule applies no further than this precise question; for as often as the question is, what were the collateral circumstances attending the agreement? so often may such collateral circumstances be proved by parol evidence; there is no law which says such collateral circumstances may not be so proved. . . If duress be pleaded, or a false reading of the deed, you avoid the deed at law by parol evidence, but then these facts are collateral to the import of the instrument, they are *dehors* the agreement; they do not go to vary or alter it; yet admitting the truth of the agreement, they tend to shew that it ought not to affect the party. These are two instances at law; there are many more in equity, on fraud and circumvention and many other grounds, and you must necessarily admit parol evidence on all such grounds, which are clearly collateral to the agreement itself. Now, to apply this to the present case: What is the true agreement? The defendants say, that it is only an agreement for the security of money. This is not collateral to, but a part of, the agreement itself. It might have been received if you had attempted by it only to raise a trust: but here the written agreement manifestly imports one thing, and you would by parol evidence shew that it imports no such thing."

Hotham, B., also said, The deed "imports to be a joint contract, and if parol evidence were to be received in the manner the defendants wish, it would be setting up a per-

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fectly distinct contract instead of it; but as to admitting it to shew collateral circumstances, it is not only consistent with former authorities, but is absolutely necessary: for fraud must be always *dehors* the deed; and it would therefore be the height of injustice to exclude it to this point." The evidence therefore offered in *Davis* v. *Symonds* was rejected.

It remains to examine the other judgments in *Greenshields* v. *Barnhart*, and also those in the subsequent cases so far as is necessary to bring out clearly the general principle which governs the question of the admission of parol evidence on the question of "mortgage or no mortgage," and, then, to see how these and the English cases severally illustrate the application of this principle.

A. H. FRAZER LEFROY.

(*To be concluded.*)

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EDITORIAL REVIEW.

A Students' Library.

Any one having occasion to frequent the Library of Osgoode Hall can bear testimony to the fact that it is always difficult, and sometimes impossible, to obtain a leading text book, if it happens to be one of the books on the curriculum. The reason given, and apparently the true one, is that they are greatly sought after by the students, who as a rule, are sagacious enough to choose the latest editions, which in consequence are the most difficult to procure. We are also credibly informed, that such books are sometimes, after diligent search, found upon shelves seldom visited, and among works seldom consulted. In fact, after use for the time being, they are put in the last place where one would go to look for them who was not instructed in the ways of the sagacious student. If not found, they are ready for use again by the same reader who deposited them.

We cannot blame the students, who have little enough advantages, for endeavouring to make the best use of their time when they can; but it is not a becoming thing to hide books away for future use, nor is it so to secrete oneself with perhaps the only copy of the last edition of a work in some quiet corner of the Hall with a view to a few hours solitary and exclusive use thereof. The evil arises to a great extent from the want of attention to the students' requirements. If this want were fully supplied, gentlemen of the Bar would reap the full benefit of such text books, from which they are now to a great extent excluded.

The remedy which we would suggest is this. Let either a dozen, or as many as the case may require, of each of the text books upon the curriculum be purchased by the Law Society for the exclusive use of the students. Let a room, prepared for the books and furnished with tables and chairs, be allotted solely to them, for the purpose of study during the day, and, if need be, during the evening. Let it be put under the management of a committee of students who

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must be approved by the Library Committee, and who should give security for the due care and protection of the books. Let the Students' Committee report to the Secretary of the Law Society, as often as need be, the state of the books, and account for them to him. Let half of each set of the same work be allowed to circulate for a certain period, according to the time required to read it. Any infringement of rules, or any loss of, or neglect or refusal to account, for any book upon demand, should be followed by an immediate closing of the room and a withdrawal from use and circulation of the books until the default is made good. In fact, give the students such privileges as they want; interest them in their reading by facilitating it; put them upon their honour to observe the conditions upon which they acquire their privileges, and we venture to say, that the confidence so reposed will not be abused. If the students are thus satisfied, we think there would be a cessation of the difficulties in finding text books in the Library. A double benefit would thus accrue to the members of the Law Society, and at an expense exceedingly small in proportion to the good that would be done.

In consideration of adequate privileges so accorded, the students should consent to forego the almost exclusive use of the text books and the tables in the Library.

Postponements for Convenience of Counsel.

We see, by an article in the lay press, that the ancient traditions of the lawyers of Poughkeepsie were rudely shattered by Judge Gilbert of the Supreme Court. It appears that it had not been the practice for the Bar to be ready on the first day of the sittings. Upon the opening of Court before Judge Gilbert this practice was strictly observed, and no one anticipated anything but the usual postponement to enable Counsel to prepare for the next day. Very unexpectedly, the learned Judge commenced calling off the cases on the docket, and got through the number entered without succeeding in getting a single case to try; whereupon, there being in fact no business ready to be attended to, he adjourned Court, and dismissed the jurors in attendance.

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The incident revives in our memory an anecdote told of a late celebrated lawyer, whose talents adorned the Bar of Upper Canada. It is related of him, that a docket at one of the Assize towns was being thus summarily disposed of, when a case came on in which he was engaged. The action was on a promissory note, and was of course not ready for trial. But the learned and brilliant advocate was equal to the occasion. He expressed himself ready to proceed. A jury was called and sworn, whereupon he addressed them upon the history of the mercantile law of England, explained the origin and growth of Bills of Exchange and all negotiable paper, and expounded the laws affecting it in a learned and eloquent speech, which so pleased the learned Judge of Assize that he forgave the delinquencies of the others and restored the docket. This is the anecdote as we have often heard it related; but we cannot vouch for its correctness in detail. We wonder that no one of our learned American brothers was inventive enough to save the Poughkeepsie docket from the hands of its destroyer.

We cannot help thinking that the learned Judge was right; though, such a sudden change might have been preceded by some warning. It is sometimes said, that there is no use in proceeding if Counsel is not prepared to argue the case; but this cannot apply to all cases. If there has been any unavoidable reason for his not being prepared, common courtesy requires that he should have time to prepare; but it is not right that Judges, jurors and suitors, should spend their time in awaiting the convenience of one man, if he might, by using reasonable speed, have been prepared in time. The rule, that enlargements will not be granted for the convenience of Counsel, was very rigidly enforced, a short time ago, in some of our own Courts.

NOTE.—Our Review of Exchanges and some Book Reviews have been necessarily omitted this month for want of space.

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BOOK REVIEWS.

The Ontario Judicature Act, 1881, Rules of the Court and Forms, with the Orders of the Court of Appeal, and other Acts, Orders and Rules relating to the practice in the Supreme Court of Judicature, with practical notes, by JAMES MACLENNAN, ESQ., one of Her Majesty's Counsel. Toronto: Copp, Clark & Co., 1881.

Mr. Justice Armour, in delivering judgment in *Clark* v. *Creighton* (*a*) says: "The avowed object of the Legislature in passing an Act, as made known to the public by the discussion that takes place upon the Bill in its passage through the Legislative Assembly, and the intention of the Legislature in passing the same Act, as extracted by the judicial process, are often widely different."

Mr. Maclennan says in his preface, "The book was undertaken at the suggestion of the Attorney-General for Ontario, under whose auspices the Act was passed, and who was good enough to place the notes which he had made in preparing the Bill for the Legislature at the service of the Editor, and who has also favoured him with valuable suggestions in the preparation of the work."

If the learned Editor's object were to furnish a binocular through which to read the Act, of which the one glass is formed of the "avowed object" of the Legislature as explained by the father of the measure, and the other is formed of the cases exhibiting that intention "as extracted by the judicial process," we fear he would make us squint horribly. We are happy to say, however, that a perusal of the work does not (as yet, at any rate) produce obliquity of mental vision.

(*a*) 45 U. C. R. at p. 578.

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The introduction is concisely written, and gives an excellent bird's-eye view of the Act, noting the changes that have been made in practice, as well as the general policy of the measure.

In the annotations to the Act and Orders, the learned Editor contents himself, in many instances, with pointing out the difference between the English Acts and that of Ontario, and with making cross-references. The adoption of the latter mode of annotation has this advantage, that it brings into juxtaposition for the student those parts of the Act which either harmonize or contrast with each other; while the former method in many cases furnishes a key to the English decisions upon each section, and prevents misconception of their effect. The citations are neither numerous nor voluminous, but seem to be well selected.

Touching the subjects of Mandamus, Injunctions, Receivers and Infants, the learned Editor gives several instances in which the Common Law and Equity Jurisdictions have hitherto been exercised, and cites cases in which, under this enactment, the jurisdiction of the Court may be called into operation. The modes of trial under the C. L. P. Act, the jurisdictions, respectively, of the Clerk of the Crown and Pleas in the Queen's Bench, and the Referee in Chancery Chambers, and the Chancery Orders as to Guardian *ad litem*, are given due prominence. The rational plan of placing the forms near the end of the volume, where one is accustomed to look for them, has been adopted. These are followed by the Orders of the Court of Appeal, annotated, and, what will no doubt be found very useful to the practitioner, a table showing the time allowed by the Act, and Orders for doing any act, etc.

While we repeat our former observation, that the citations are neither voluminous nor numerous, they are yet sufficiently pointed and explicit to furnish apt illustrations of the meaning of the sections under which they are placed.

After a careful inspection of the work, we render our verdict, that the learned Editor's hope will be realized, viz.,

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that it will be "of assistance in studying" the changes introduced in the Act, though, we must say, that the practitioner will not find it a *vade mecum* of the new practice.

We regret that many incorrect readings occur, which is due probably to the hasty passage of the work through the press.

The learned Editor in his marginal references to the rules, has adopted the curious plan of numbering them consecutively from beginning to end, without regard to their numbering and classification under orders as they appear in the Act. We think that a reference, on each page, to the orders and rules, according their to statutory classification and numbers would have been more rational.

BOOKS RECEIVED.

Principles of the Law of Torts; or Wrongs Independent of Contract. By ARTHUR UNDERHILL, M. A., of Lincoln's Inn, Barrister-at-Law; assisted by CLAUDE C. PLUMPTRE, of the Middle Temple, Barrister-at-Law; with American cases, by NATHANIEL C. MOAK, Counsellor-at-Law. Albany, N. Y.: William Gould & Son, 1881.

The Law of the Road, or the Wrongs and Rights of a Traveller. By R. VASHON ROGERS, Jr., of Osgoode Hall, Barrister-at-Law. Carswell & Co., 11 St. Giles Street, Edinburgh, and Toronto, Canada, 1881.

The Law of Registration of Titles in Ontario, being an annotation of the Registry Act, together with a collection of practical forms, tarriff of fees, etc. By EDWARD HERBERT TIFFANY, of Osgoode Hall, Barrister-at-law. Carswell & Co., Law Publishers, Toronto and Edinburgh, 1881

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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

In the Court of Appeal.

PROUDFOOT, V.C.] [JUNE, 1881.

HATHAWAY v. DOIG.

Nuisance—Injunction—Husband and Wife—Title—Adding parties.

The plaintiff's wife was tenant in fee of the land upon which she and her husband lived, the latter living with her by virtue of his marital right. The plaintiff, by his bill, alleged title in himself, and injury to his property from a nuisance caused by the defendant's business.

Held, reversing the judgment of the Court below on this point, that the wife was the proper person to file the bill; for, as injury to property is the ground of jurisdiction in cases of nuisance, the owner of the property is the proper party to complain, and *quære* whether the husband has any title in the land, and whether his occupancy with his wife is more than permissive on her part.

An application was made by Counsel to add the wife as a party in order to meet the difficulty, authority having been given by the wife for that purpose.

Held, that the suit was not merely improperly constituted, but that, the husband not having any *locus standi*, the suit had no proper existence at all, and another person who had the right, could not be substituted for one who had not the right, to institute the proceedings.

In other respects the judgment of the Court below (noted *ante* p. 383) was affirmed.

McCarthy, Q.C., and *J. H. Ferguson*, for appellant.

E. Blake, Q.C., and *W. Barwick*, for respondent.

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In the Queen's Bench.

[25TH JUNE, 1881.

DREW v. THE CORPORATION OF EAST WHITBY.

Negligence—Injury by fellow servant.

The Plaintiff being engaged in the service of the defendants in repairing a bridge was injured by the negligent fall of the hammer of a pile driver, the order to raise which which was given by M. The work was being performed in R.'s section, R. being a Councillor. M., the Reeve of the municipality was employed at day wages by R. as foreman as he understood the work, after several ineffectual endeavours had been made to get another man.

Held, that M., though Reeve, was not present in that capacity but as a hired fellow servant with the plaintiff and there was nothing to so indentify him in the work with the defendants as their chief officer as to take the case out of the ordinary rule governing the relations of fellow servants.

J. K. Kerr, Q.C., for plaintiff.

Ritchie, for defendants.

GRIFFIN v. MACKENZIE.

Chattel mortgage—Refiling.

The plaintiff held a chattel mortgage made by one G. which was dated 9th May 1879, and filed 13th May. Defendants' mortgage from the same mortgagor was dated in the December following. On the 12th April 1880 the plaintiff made affidavit of the amount due up to the 10th April, and refiled the mortgage under R. S. O. cap. 119, sec. 10. The defendants were landlords of the mortgagor and illegally distrained for rent, whereupon the plaintiff brought trover for goods levied upon by them and contained in his mortgage.

Held, that the defendants could not object to the informality in the refiling of the plaintiff's mortgage, in that the statement of the amount due was not made within the thirty days which proceeding the expiration of the year.

Fitch, for plaintiffs.

Hodgins, Q. C. for defendants.

SMITH v. BAMFORD.

Ejectment—Statutes of Limitations—Tenancy at Will—Entry—New Trial.

An entry upon land under assertions of right, and a submission by the occupant and consent to remain as tenant to the owner, create a new

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tenancy at will, and give a fresh point of departure under the Statute of Limitations.

Where the attention of the jury had not been called to evidence which bore upon this point a new trial was directed.

Smith, Q. C., for plaintiff.

J. W. Kerr for defendant.

BAILLIE v. DICKSON.

Promissory Note—Endorser—Notice of dishonour—Sufficiency of.

A notary at Montreal, Quebec, protested a note upon which the defendant, an attorney practising at Belleville, Ontario, was endorser. The notary could not read the defendant's signature, but made an imitation of it upon the notices and in the superscription of the letter which was addressed to "Belleville, P. O.," *i. e.*, Province of Ontario. The defendant was well known at, and constantly received letters from the Belleville Post Office. There was proved to be a Belleville in New Brunswick. Other notes, with his endorsement thereon, had been protested by the same notary. The defendant swore that he had never received the notice; but his clerks, who were accustomed to take his morning letters from the post office, were not called. The notice to another endorser, addressed to "Belleville, P. O.," was received by him.

Held, (Cameron, J., dissenting) that if the imitation of the defendant's signature put upon the notice addressed to Belleville was an exact imitation of defendant's signature upon the note, and such notice was posted at Montreal, it would have been sufficient, whether it reached its destination or not. But

Held, (Armour, J., dissenting) that, upon the facts in evidence, there should be a new trial.

Per Armour J. Upon a comparison of the imitation of the signature in the notice before the Court with the actual signature, the imitation was sufficiently good to induce the Court to infer that the imitation in the address was equally good.

Per Cameron, J. The illegibility of the address amounted to no notice.

Bethune, Q. C., for plaintiff.

Ferguson, Q. C., for defendant.

LAING v. THE ONTARIO LOAN AND SAVINGS COMPANY.

Growing crops, mortgage of—Mortgage of land—Statutory distress clause—Right of Mortgagee to distrain.

The right given to a mortgagee under the distress clause of the short forms of Mortgages Act is a mere license to take the mortgagor's goods, and does not warrant the taking of a stranger's goods on the mortgaged premises.

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Where a mortgagor becomes tenant at will to the mortgagee, the crops on the land belong to the mortgagor as emblements.

A chattel mortgage of crops of which the seed has just been sown will pass the property in the crops.

The plaintiff held such a chattel mortgage; and the defendants were mortgagees of the land upon which the crops were grown, which mortgage contained the statutory clause accelerating payment on default, proviso for quiet enjoyment till default, and distress clause. They distrained upon the crops growing and severed contained in the chattel mortgage, nearly a year after the default in their mortgage.

Held, that their licence under the distress clause did not entitle them to take goods of a stranger upon the land, and that the crops having passed to the plaintiff under his chattel mortgage, the distress was illegal.

Bethune, Q.C., for plaintiff.

Ritchie, for defendants.

HAMILTON v. HARRISON.

Chattel mortgage—Consideration—Growing Crops—Registration—Affidavit, sufficiency of.

The affidavit of *bona fides* in a chattel mortgage purported to be sworn before "T. B. F.," without any addition. The affidavit of execution was sworn before the same commissioner, his name being followed by the words, "A Commissioner in B. R. &c."

Held, no objection to the affidavit of *bona fides*.

The consideration in the mortgage was stated as $1,148; but it appeared in evidence that the amount actually owing was only $1,030.80.

The learned Judge at the trial non-suited the plaintiff, on the ground that the consideration was not truly stated, and that the mortgage was therefore void as against the defendant, an execution creditor.

Held (Armour, J., dissenting), that the non-suit was wrong, for the question of the truth of the consideration was not one of law, but a circumstance for the jury to consider when deciding the issue of fraud or no fraud.

The mortgage covered growing crops.

Held (Armour, J., dissenting), that, as growing crops are incapable of delivery or change of possession, without change of occupation of the land, they are not within the Chattel Mortgage Act.

G. A. Mackenzie, for plaintiff.

McGillivray, for defendant.

REGINA v. HODGE.

License Commissioners' resolutions—Infringement of—Delegation of Legislative powers—Constitutionality of.

The Board of License Commissioners for Toronto acting under ss. 3, 4 and 5, of R. S. O. cap. 181, passed resolutions to the effect that no

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licensed victualler should sell any intoxicating liquor, etc., to any child apparently under the age of fourteen years etc., and should not suffer any billiard table, etc., to be used in his tavern during the time prohibited by the Liquor License Act or by the resolutions for the sale of liquor therein, for breaches of each of which resolutions the defendant was convicted before the Police Magistrate.

Held, that the conviction was bad; for the act of the defendant was not an infringement of "any Law of the Province," within the meaning of sec. 92, s-s. 15 of the B. N. A. Act; and the Legislature, acting under the circumscribed authority of the latter Act, had no power to delegate its authority and enable the License Commissioners to create new offences.

Fenton, for the conviction.

J. K. Kerr, Q. C., contra.

REGINA v. FRAWLEY.

Hard Labour—Provincial Legislature—Power of, to Impose.

"Hard Labour" is an substantive statutable punishment, additional to the mere restraint of liberty by imprisonment, and the power to imprison only does not carry with it a power to to subject hard labour.

Held, therefore, that the Ontario Legislature, acting under sec. 92, s-s. 15 of the B. N. A., Act, which gives it power to impose punishment by "fine, penalty, or imprisonment" for the breach of any law of the Province, had no power to add hard labour to imprisonment, and a conviction pursuant to ss. 51 and 68 of R. S. O. cap. 181 under which the defendant was sentenced to hard labour was quashed.

Hodgins, Q. C. for the Crown.

Odgen, for the defendant.

REGINA v. COLEMAN.

Municipal Councillor.

The judgment of Hagarty, C.J., noted *ante* p. 387, was affirmed.

REGINA *ex rel.* CLANCEY v. McINTOSH.

Mayor—Qualification—Last revised assessment roll—Acceptance of office.

The acceptance of office by a Mayor elect, referred to in R. S. O. cap. 174, sec. 180, within a month of which a writ of *quo warranto* to try the validity of his election, must issue, is a formal acceptance by declaration of qualification or office, and not a mere verbal acceptance by speech to the electors, or such like. *Linton* v. *Jackson*, 2 P. R. 18, dissented from.

The defendant was not assessed for the year 1880; but in that year was assessed on the 3rd September for the year 1881 upon unincumbered lease-

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hold property of the value of $4,100. By by-law of the City of Ottawa this assessment was revised before the 15th November and returned on 31st December as and for the assessment roll for the year 1881. No appeal was had therefrom. The nomination took place on the 27th December, 1880, and the defendant was elected Mayor of Ottawa on the 3rd January, 1881.

Held, that the election commenced on the nomination day; and the assessment roll mentioned, which was to take effect in 1881, and not before, was not the last revised assessment roll at that time, within the meaning of the by-law and R. S. O. cap. 180, sec. 44, and the defendant could not qualify thereon.

Ogden, for the relator.

Aylesworth, contra.

In the Common Pleas.

[EASTER TERM, 1881.

THE ONTARIO BANK v. MITCHELL.

Judgment debtor—Examination of.

In an examination of a judgment debtor, under R. S. O. cap. 50, sec. 304, the object of the enquiry is to show what property or means the debtor has at the time of examination which can be made available to the creditor, and the enquiry is not restricted to the period of the contracting of the debt, but it may be shown that, at some anterior time, no matter how far back, the debtor had property as to which he may be required to give an account and it is not a sufficient answer to the enquiry merely to say that it has all been disposed of before the debt was incurred.

A rule to set aside an order of commitment of the defendant for his refusal to give an account of property had before the contracting of the debt was therefore refused.

J. B. Clarke, for the Rule.

WALTON v. THE COUNTY OF YORK.

[24TH JUNE, 1881.

Appeal—Appeal allowed—Disposal of rule nisi in Court below.

In an action for negligence in not keeping in repair a County road, the jury found for the plaintiff. A rule *nisi* having been subsequently obtained to enter a nonsuit or for a new trial, the Court made it absolute to enter a nonsuit. On appeal to the Court of Appeal, the Court allowed the appeal and directed the rule *nisi* to enter the nonsuit to be discharged, but stated that as to that portion of the rule in which a new trial was asked, they made no order but left it to be disposed of by this Court. On motion to this Court to dispose of the motion,

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Held, (Wilson, C.J. dissenting) that the rule had been completely and finally disposed of so far as this Court was concerned by the rule to enter a nonsuit, and if the defendants had desired to have the question of the new trial reserved, that should have been done by the Court at the time.

Donovan, for plaintiff.

J. K. Kerr, Q.C. for defendants.

VANDERLIP v. SMYTH.

Road Company—Check gate—Authority to erect.

The plaintiff, a stage-driver, was in the habit of plying and driving passengers over that part of the S. T. &c., Road Company's Road, a company incorporated under C. S. U. C., cap. 49, and previous acts, between Thorold and the terminus of the S. Street Railway (laid down on the line of the road), a distance of about two miles. There was a principal gate beyond the terminus of the street railway, and another in the opposite direction beyond the plaintiff's starting point, the distance between them being nearly three miles. The defendant, who was the lessee and manager of the road, erected a ckeck gate across the road at a point within the space travelled by the plaintiff—distant, 22 chains, 53 links from the street railway terminus, and 41 chains and 40 links from the gate beyond—and then enforced payment of toll, giving a ticket which entitled the holder to pass through the gate beyond.

Held, that the statute conferred the power to erect such check gate.

The company consisted of some four persons, two of whom, F. and another, personally signed an authority to the defendants to erect the gate, and F. signed for the other two under a power of attorney, which, though very full in its terms, did not specially refer to the road; but after action commenced, these two other persons ratified and confirmed F.'s act by endorsement on its back of the authority.

Held, sufficient.

McClive for plaintiff.

Bethune, Q. C., and *Nesbitt*, for defendant.

In re MEAD v. CREERY: THE DOMINION L. & S. CO., GARNISHEES.

Division Courts—Garnishing debt beyond pecuniary jurisdiction.

The judgment of Cameron, J., noted *ante*, p. 111, was reversed as to the jurisdiction of Division Courts to garnish sums not within the jurisdiction of the Courts in actions of debt.

R. M. Meredith and *Aylesworth*, for the primary creditor.

J. R. Roaf for the garnishee.

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MONTREAL CITY AND DISTRICT SAVINGS BANK v. CORPORATION OF PERTH.

Debenture—Condition precedent—Presentation—Pleading.

The judgment of Osler, J., noted *ante*, p. 335, was affirmed.

Richards, Q. C., for plaintiffs.

R. Smith for defendants.

CARLISLE v. TAIT.

Chattel mortgage—Agent of Bank—Affidavit of bona fides—Statement of knowledge of circumstances—Purchaser under mortgage.

Where the agent of a bank makes the affidavit of *bona fides* to a chattel mortgage, it must appear either in the affidavit of the agent or in some other way from the mortgage or other papers filed with it, that the agent is aware of the circumstances connected with the transaction.

Semble, per Wilson, C.J. The purchaser at a sale by the mortgagees, under the power of sale contained in the mortgage leaving the mortgagor in possession, is protected so long as the mortgage under which he bought has the protection given it by registration; but when the term of the mortgage expires the purchaser is no longer protected unless he takes actual possession or procures and registers a bill of sale from the mortgagee.

Falconbridge, for plaintiff.

McClive, for defendant.

MILLS v. KERR.

Assignment for benefit of creditors—Restriction to partnership creditors—Validity—Parol evidence.

G. and W., carrying on business under the name of G. & W., becoming indebted to several persons, and unable to pay their debts, executed a deed of assignment to the plaintiffs of all the estate of the partnership of G. & W., and of all the furniture, goods, chattels and effects whatsoever (the personal apparel of himself and family excepted) now being in about the dwelling house of the said G., to pay all the creditors of G. & W., who were in insolvent circumstances. It was proved that there were separate creditors.

Held, that the deed was void as providing only for the partnership creditors, and that the intent of the parties that the deed was to include the separate creditors could not be supplied by parol evidence.

Bethune, Q.C., for plaintiff.

Rose, for defendants.

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REGINA v. LEWIS.

Municipal Councillor.

The judgment of Hagarty, C.J., noted *ante*, p. 387, was affirmed by the dropping of the rule to reverse it. Wilson, C.J., was for affirming it, Osler, J., dissenting; while Galt, J., took no part.

THE CANADA PERMANENT L. & S. COMPANY v. McKAY.

Ejectment—Possession—Statute of Limitations.

In 1851 the defendant agreed to buy the land in question, his father, who lived in Scotland, sending the money to another son for that purpose, and, by family arrangement, the deed was taken and registered in the name of the defendant's son, W., then about twelve years old. The defendant and his family took possession and lived there up to the present time the family residence, with the garden and orchard about it, comprising in all about two to four acres, being deemed to be the defendant's special property, and he had always exclusive possession thereof with the consent of the others. W. resided with his father for several years, and then went to the United States, but returned in 1868, when he conveyed in fee simple by deed registered to his step-brother, one H., who had full knowledge of all the facts and circumstances; and the defendant at the time complained to him of the sale, and denied W.'s right to do so. H., in 1870, and again in 1874, mortgaged the land by mortgage registered to the plaintiff. The land was worked on shares by H., the defendant and another, and the defendant was assessed, and paid the taxes on the whole lot. The plaintiffs had no notice or knowledge of any of the circumstances, or of the defendant's possession.

Held, that the plaintiffs, under their registered paper title, were entitled to recover, except as to the house and plot, to which the defendant, by his exclusive possession, had acquired a title under the statute of limitations.

Robinson, Q. C., for plaintiffs.

Maclennan, Q. C., for defendant.

LEE v. THE PUBLIC SCHOOL BOARD OF TORONTO.

Public Schools—Trustees—Disqualification—Special case—Mandamus and Injunction.

Held, (Osler J. doubting), on a special case stated for the opinion of the Court of Chancery and transferred by order of a judge thereof to this Court, that the fact of the Public School Board of the City of Toronto, entering into an agreement with and purchasing their stationery and school supplies from a publishing company, and having obtained gas from a gas company and insured their property in certain insurance companies, of which said companies, the plaintiff was a stock holder, did not disqualify him from acting as a Trustee of the School Board and render his seat vacant under 44 Vict. cap. 30 sec. 10.

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Per Osler, J. He was not satisfied that this Court could properly entertain the case, no fact being disclosed upon which the Court could exercise the jurisdiction of granting an injunction at law under the Act relating to mandamus and injunctions, R. S. O. cap. 52 sec. 30, no wrongful action having been actually done by the School Board, but merely an injury to the plaintiff's rights threatened; and the doubt as to the disqualification arose from the fact of the contracts especially those made with the publishing company, appearing to him to be rather within the mischief of the Act; and though not disposed to dissent he should feel himself at liberty to reconsider the question, should it again be presented in a form in which a binding judgment could be given.

H. J. Scott, for plaintiff.

Howard, for defendant.

SUTTON v. ARMSTRONG.

Chattel Mortgage—Assignment—Intent of parties—Recognition of title—Evidence—Trespass.

Action of trespass for seizing a quantity of grain. The seizure was made under powers therefor contained in one or both of two chattel mortgages, for the mortgage's default in selling certain of the goods without the mortgagee's consent. Both of the mortages were executed on the 26th May 1880 by the plaintiff to one J. G. and comprised the same goods and chattels, namely a quantity of farming implements and stock, and all the grain in hand or on the ground upon certain land named, 56 acres of spring wheat, etc. One of the mortgages was to secure $215 and interest; the other being as it recited a security for certain prommissory notes of the mortgager for $520 endorsed by the mortgagee. These notes had been discounted by the defendant who was the holder thereof. On the 24th, July both the mortgages together with the goods and chattels comprised therein were assigned to the defendant by assignments executed by R. G. under a power of attorney from J. G. On 22nd July, R. G. and J. G. who had been trading in partnership, assigned to two persons O. and K. upon certain trusts for the benefit of creditors, amongst other things, all the grain, farm stock, crops, whether growing or cut, and other chattels and effects of the said assignors or either of them upon the said land or otherwise wheresoever situate, as also all mortgages and all other personal estate wheresoever situate of the said assignors or either of them or in which any of them had any right or interest.

Held, that the terms of the deed of assignment were sufficient to include these mortgages and the goods comprised in them, and therefore as regards the first named mortgage, there being no contrary intention, it passed under the deed, so that the subsequent assignment of that mortgage to defendant was of no avail; but as regards the other mortgage, the defendant being the owner thereof, and the mortgagee having no interest therein there could be no intention that it was to pass under the deed, and therefore the mortgage passed to defendant under the assignment to him.

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Semble, that there was evidence to show that the plaintiff recognised the defendant's title as assignee.

Dixon, for plaintiff.

W. Mulock, for defendant.

In Chancery.

[THE CHANCELLOR, 1ST JUNE, 1881.

FRASER v. GUNN.

Mortgage, assignment of—Mortgage paid but not discharged—Subsequent incumbrancer—Priority.

The owner of land created a mortgage thereon in favour of one M. and died without redeeming; and the equity of redemption descended to C. F., his heir-at-law, who, with her husband P. F., joined in a conveyance thereof to trustees charging the same with the support and maintenance of the plaintiffs, and subject to which and the mortgage in favour of M. the premises were vested in P. F. in fee. P. F. subsequently, and in September, 1875, paid the amount due on M.'s mortgage, but it was not actually discharged. In December following, P. F. sold to W. F., conveyed to him the equity of redemption, and procured M. to assign to W. F. his mortgage. In March, 1877, W. F. mortgaged the land to a loan company, but did not assign the M. mortgage; and subsequently the plaintiffs filed a bill seeking to have the charge for their maintenance enforced against the mortgaged estate.

Held, on appeal from the Master at Hamilton, reversing his finding, that the loan company were under the circumstances entitled to priority over the plaintiffs to the extent of the amount secured by M.'s mortgage.

Tectzel, for the appeal.

F. Beverley Robertson, contra.

COURT v. HOLLAND.

Mortgage, assignment of—Subject to equities—Occupation rent by mortgagee—Puisne incumbrancer.

There were dealings between mortgagor and mortgagee, without any settlement of accounts between them, and the mortgagor became insolvent; and at the date of the insolvency there existed a right of set-off against the mortgagee for a balance due from him on the general account.

Held, affirming the Master's finding, that this right of set-off passed to the official assignee of the mortgagor on insolvency, and that the assignee the mortgagee took the mortgage subject to this equity.

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As between mortgagor and mortgagee, there is nothing to prevent the mortgagee from taking possession of the mortgaged premises at a fair and reasonable rent fixed by agreement between them. The mortgagee is not technically "mortgagee in possession" under such an agreement.

But, in such a case, a subject incumbrancer, whose mortgage existed before the first mortgagee went into possession, is not bound by such an arrangement, and the Master may charge the first mortgagee with more than the fixed rent, if it be not a fair occupation rent.

G. M. Rae (with him *Hoyles*), for the appeal.

Maclennan, Q.C. (with him *Riordan*), and *Black*, contra.

FOX v. NIPISSING RAILWAY CO.
GOODERHAM v. THE SAME.

Receiver—Matters before appointment of.

After a decree for a Receiver, but before his actual appointment herein, the defendant Company had made a payment to a creditor, which the petitioner herein, a judgment creditor, claimed to be a fraudulent preference. He therefore asked that the Receiver be ordered to contest the question.

Held, that as the matters complained of took place before the actual appointment of the Receiver, it was more reasonable that those who were interested at that time, and who objected to what had been done, should in person apply for the appropriate relief.

G. T. Blackstock, for the petitioner.

Maclennan, Q.C., for the Receiver.

[25TH JUNE, 1881.

STAMMERS v. O'DONOHOE.

Vendor and Purchaser—Vendor's duty as to incumbrances—G. O. 226—Practice.

Where a Vendor agreed to pay off a Mortgage existing on the property, and the decree directed a good and sufficient conveyance "according to said agreement," importing that the lands were to be conveyed free of incumbrances, the Court directed that the Vendor pay off the mortgage within a limited time, and, in default that the purchaser should be at liberty to do so, procure an assignment and have his remedy against the Vendor whose conveyance he was not bound to accept till this mortgage was paid off; the purchase money in Court to be applied *pro tanto* thereto.

Held also that, as the matter had been referred to the master by the decree which was for specific performance, it should have been disposed of in his office under G. O. 226.

Foster, for plaintiff.

H. P. Sheppard, for defendant.

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FOSTER v. MORDEN.

Mortgage of Stock in trade—Construction of—Pending reference—Receiver.

The defendant advanced money on loan to the plaintiff, taking as security therefor an agreement, whereby the defendant took possession of the stock in trade, being that of a druggist, and premises, to hold them for four months as security for repayment of the loan. Power was given to add new stock, so as to keep up the business. Default was made in payment, and thereafter a large amount of stock was added, some money being expended with the plaintiff's consent in replenishing it, and part of the profits of the business was re-invested in new stock. Some of the original stock remained in specie. The matter was referred to the Master at Belleville to take accounts. Before the Master made his report he certified that it appeared to him that the defendant had been paid out of the business upon which the plaintiff applied on petition for a Receiver, and from which the defendant appealed. The motions were argued together.

Held, that, as the new stock belonged to the defendant himself, and the plaintiff could therefore have no claim upon it, and as the Master had not yet found which party was indebted to the other, this finding would not be anticipated by the appointment of a Receiver.

Held, also, that the defendant's right was, on default, to sell the original stock *en bloc* after notice; but that the defendant was at liberty to add further capital to the business, though not to the prejudice of the plaintiff so as to improve him out of his estate, and as long as the plaintiff chose to let the business go on under the defendant's control, the latter had the right so to conduct it subject to being called upon to account.

Arnoldi, for plaintiff.

A. Hoskin, Q. C., for defendant.

[PROUDFOOT, V.C.

In re COLTON ; FISHER v. COLTON.

Administration—Suretyship—Executrix de son tort—Practice.

It is competent to the Court, on a proper case being made, to appoint a personal representative to an estate (or to dispense with one altogether), and then to direct the administration of the estate. Where the claim against a deceased's estate is one arising out of a contract of suretyship, the Court will not, unless by consent, direct its investigation except on a bill filed.

Semble, that administration of an estate will not be ordered by the Court, where no legal personal representative has been appointed or properly dispensed with, though an executrix *de son tort* is before the Court.

Hoyles, for the motion.

H. Cassels, contra.

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[11TH JUNE, 1881.

ROBLIN v. ROBLIN.

Marriage, validity of—Intoxication of one party—Conspiracy to procure marriage—Ratification—Alimony—Undertaking to receive back wife—Costs.

Intoxication to such a degree as to deprive a man of all sense and volition, and to render him incapable of understanding what he was about, must be proved to induce the Court to hold that there was no marriage on that account. Such an alliance is a voidable marriage, and, by ratification, may become a good marriage.

Three years after a ceremony of marriage, alleged to have been performed while the man was intoxicated and under arrest, the man admitted in writing on the record in an action for necessaries supplied the woman and for expenses of burial of her child, and in which the validity of the marriage was in issue, that the marriage was a valid one, and he thereby also consented to a verdict for plaintiff.

Held, a sufficient ratification of the alleged voidable marriage.

Semble, that a consent to marry, procured by a combination of persons friendly to the woman against the man, to which conspiracy the woman was not a party, would not suffice to avoid the marriage.

In a suit for alimony where the husband disputed the validity of the marriage, he stated when under examination, that he would receive the woman back as his wife, if the Court was of opinion that the marriage was a valid one. The marriage having been found valid it was decreed that upon the defendant's undertaking to receive the plaintiff as his wife the bill should be dismissed, the defendant paying costs between solicitor and client.

Moss, for plaintiff.

S. H. Blake, Q.C., for defendant.

[14TH JUNE, 1881.

THE TOWNSHIP OF THURLOW v. THE TOWNSHIP OF SIDNEY.

Municipal Corporation—Arbitration—Time for making award.

Semble, that the combined effect of ss. 377 and 380 of the Municipal Act is to empower the arbitrators in cases within them to extend the time for making their award beyond a month.

The plaintiff municipality sued upon an award whereby the defendant municipality were ordered to pay their proportion of the cost of a drain constructed by the plaintiffs. The arbitrators met, and adjourned from time to time; and counsel for defendants appeared before them, and made

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no objection that the month from the appointment of the third arbitrator, prescribed by sec. 397 of the Municipal Act, had elapsed without an award having been made.

Held, that the award made after the month had expired was valid.

(This was a Queen's Bench case tried at the Belleville Sittings.)

VINDEN v. FRASER.

Fraudulent conveyance—Chose in action of wife—Receipt by husband as trustee.

The defendant W. F. was married to his co-defendant in 1849 without a marriage settlement. He was executor of his wife's father's estate, and, "acting for his wife," received large sums therefrom, which he borrowed from his wife—one sum of £7,600 before 1859, and one of £2,800 in 1879. These sums were charged to the wife in the books of the estate. The land attacked in this suit and other property were bought with these moneys, but the deeds were taken in W. F.'s name. The wife's mother had often urged W. F. to settle the property which he had bought with his wife's money upon his wife. He and one C., in 1872 and 1873, entered into large speculations and made a large amount of money. In 1873 C. borrowed $10,000, and W. F. endorsed his note to be discounted for the loan, which had not been paid. In 1874 W. F. gave his cheque to the plaintiff, on which this suit is brought. In 1873 W. F. and his wife went to Europe, but before going, the property in question was conveyed to the wife.

Held, that, in respect of the £7,600, as W. F. had acted for his wife in procuring her money from the estate of her father, and had never claimed it as his own in exercise of his marital right, but to have borrowed it only, which was corroborated by the wife's mother's testimony, there was no reduction into possession by the husband of the money. As to the £2,800, it lay upon the plaintiff to prove a gift by the wife to the husband, but the evidence showed that it was a loan.

Held, also that W. F., as executor for his wife's father's estate, was a trustee for his wife; and the receipt of his wife's moneys coming from the estate was not alone any proof of reduction into possession.

When W. F. incurred the liability for C., he was wealthy, and remained so for about a year after the conveyance in dispute; after which time the plaintiff's debt was incurred.

Held, that the plaintiff was not, on account of his own debt, in a position to impeach the transaction, and could be in no better position than the prior creditor, who plainly could not have avoided the transaction, as the settlement was made at a time when W. F. was pecuniarily well able to make it.

Maclennan, Q.C. (with him *Riordan*), for plaintiff.

Benson, Q.C. (with him *Moss*), for defendants.

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KING v. DUNCAN.

Insolvent Debtor—Chattel Mortgage—Collusion—Preferential Judgment —R. S. O. cap. 118.

A chattel mortgagor, who was in insolvent circumstances to the knowledge of the mortgagee, shortly after the execution of the mortgage, in collusion with the mortgagee but against an expressed prohibition, made a delivery on a pretended sale of the goods to one M. which was contrary to the terms of the mortgage, whereupon the mortgagee sued upon the breach of the convenant in the mortgage, adding the common counts. The mortgage had three months to run.

Held, that the mortgage and the judgment as far as the covenant was concerned were fraudulent and invalid as against creditors.

The mortgagor was ready indebted to the mortgagee upon an account, though the time for payment was extended to three months by the mortgage.

Held, that there is no violation of the Statute, R. S. O. cap. 118, in a debtor, so sued, not taking advantage of a credit not having expired, or in his not insisting upon a merger of the debt (if any), or in facilitating judgment in anyway not expressly forbidden by the Act, and the judgment upon the common counts was therefore valid.

Boyd, Q.C. (with him *D. E. Thomson*), for plaintiff.

Moss (with him *Meyers*), for defendant.

WEBSTER v. LEYS.

Will—Construction of—Vested interest.

Held, in this case, that, in the event of the widow of the testator marrying again, the bequest in question went to the children of all the testator's brothers, and not to those of one only.

The testator gave £1,500, etc., in the event of his wife dying intestate or marrying again, to be, at her death, divided share and share alike among "my brothers' children." A daughter of W., a brother, died after the marriage, but before the death, of the widow, and so before the period for distribution.

Held, that the rule in such cases is, that a bequest in the form of a direction to pay, or to pay and divide, at a future period, vests immediately, if the payment be postponed for the convenience of the estate, or to let in some other interest; that the intention here was to let in the life estate of the widow; and that therefore a share vested in the deceased child of W., and passed to her representatives.

Boyd, Q.C. (with him *Black*), for plaintiff.

Moss (with him *Kingsford*) and *Delamere*, for defendants.

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HUNTER v. CARRICK.

Patent of invention—Combination of previously used articles—Amendment of patent for inadequate description—Use before amendment and re-issue—Novelty—Costs.

On 27th November, 1879, the plaintiff obtained a patent for new and useful improvements in bakers' ovens, claiming his invention, "In combination with a baker's oven, a furnace D, set within the oven, but below the sole A." He surrendered this patent, and a new one was issued on 26th August, 1880, representing that the first was inoperative by reason of insufficient description, which new patent was for the unexpired residue of five years from the date of the first patent. The claim of invention was 1st, In a fire pot or furnace, placed within a baker's oven below the sole thereof, and provided with a door situated above the grate. 2nd, In a fire pot or furnace, placed within a baker's oven, provided with a door above the level of the sole of the oven, and connected with the said furnace by an inclined guide. 3rd, In a flue, H, leading from below the grate, B, to the flue E. 4th, In a baker's oven, provided with a circular tilting grate, situated below the sole of the oven, and provided with a door. 5th, In a cinder grate, F, placed beneath the fire grate, B, in combination with a flue, H. The plaintiff, in his specifications claimed these as *his invention*; in his evidence he claimed a patent for each of the combinations.

Held, in the latter event, that the four latter combinations, being new, the first patent could not have been inoperative as to them, and the second patent must, in that respect, be construed as an independent one, issuing for the first time on its date; and all except the first having been used for more than a year previous to the date of the patent, he was not entitled to a patent therefor.

Held, also, that this combination of previously known articles, as applied to a baker's oven, which was productive of new and useful results, was the subject of a patent.

Some of the devices were in use before the patent issued; but numerous witnesses, engaged in the business of baking, testified that they never knew of the combination before the plaintiff invented it.

Held, on the facts, that the defence of want of novelty had failed.

Held, also, that the first combination, in the patent of 1880, was such an amendment as is contemplated by section 19 of the Act 34 Vict., cap. 26.

The defendants' oven was completed on the 3rd July, 1880, and before the re-issue of the patent. They had in use the 1st and 4th combinations, and continued the user after the re-issue.

Held, that there was no remedy for the intermediate user, as the patent was then inoperative; but as to the subsequent infringement, the user under the defective patent would not operate as a defence.

The plaintiff having succeeded as to part only, no costs were given to either party up to the hearing.

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A reference as to damages having been ordered the costs thereof were directed to abide the result.

W. Cassels, for plaintiff.

McMichael, Q.C. and *A. Hoskin, Q.C.*, for defendants.

STARK v. SHEPHERD.

Purchase of Land—Assumption of Building Society Mortgage—Ascertainment of value—Costs.

The plaintiff bought land of the defendant, paying $1,000 in cash, assuming a mortgage to a Building Society "on which $664 is yet unpaid," and giving a mortgage to the defendant for the balance to make up $2,000, the price of the land. The defendant covenanted that he had not incumbered save as aforesaid. It appeared that there were seventy-one monthly instalments of $16.75 each, to be paid on the Building Society mortgage, making in all $1,189.25; and the plaintiff claimed the difference between $664 and the latter sum. But

Held, that the plaintiff would be entitled to retain in her hands only the cash value of the mortgage at the date of the contract, if the Society would accept it; if not, then such a sum as, with interest on it, at six per cent. would meet the accruing payments.

The defendant, by his answer, admitted a mistake in the calculation of the amount due on the mortgage, and offered the difference between the $664 and what he alleged was the cash value, and costs up to answer.

Held, that, if the Society accepted present payment of the cash value, the defendant would be entitled to costs subsequent to answer.

Nacnabb (with him *Higgins*), for plaintiff.

Moss (with him *Howard*), for defendant.

[14TH JUNE, 1881.

DICKSON v. McMURRAY.

Cemetery Company—Election of Directors—Scrutineers—Qualification of.

At a meeting of the shareholders of a cemetery company, the capital stock of which was in but a few hands, a chairman was elected by the majority of votes of those present without regard to the number of shares respectively held by them. Two of the shareholders, who were also provisional directors and who were candidates for re-election, were elected

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scrutineers in the same manner, and directors were then elected, excluding the plaintiff. The plaintiff was president of the company, and had a large enough number of shares to be able, with those who favoured him, to have controlled the vote, if it had been taken according to shares. It was the duty of the scrutineers to decide as to what votes were valid; and they also interpreted, with the aid of Counsel, an instrument under which the plaintiff had advanced a large sum of money to start the company, and which provided for the future disposition of the shares of the company held by the plaintiff as security for his advances.

Held, that the duty of the scrutineers was so plainly in conflict with their interests as candidates for the directorate, that they were disqualified from so acting, and the election was set aside, and a new election ordered.

W. Cassels (with him *G. T. Blackstock*), for plaintiff.

Maclennan, Q.C. (with him *H. W. M. Murray*), for defendants.

[15TH JUNE, 1881.

KILLINS v. KILLINS.

Further directions—Defendant setting down—Right to begin.

The defendant set this cause down for hearing on further directions. At the hearing, Counsel for plaintiff was opening the case, when Counsel for defendant claimed the right to begin. It was said that the reason he cause had not been set down by plaintiff, was because his Counsel hesitated to give the certificate usual in setting down June causes. The defendant's Counsel did not insist upon the right which he claimed, but

Semble, that the setting down by the defendant, upon the plaintiff's default so to do, does not take away from the latter the conduct of the cause, nor interfere with his right to begin.

W. Cassels, for plaintiff.

Moss, for defendant.

[FERGUSON, V.C., 7TH JUNE, 1881.

In re SAYERS; SAYERS v. KIRKPATRICK.

Administration—Additional Commission.

In an administration matter, the administrator was found to have received $44,745.45, and to have properly expended $35,705.80, and to have paid the balance into Court. Nearly two hundred hours had been spent

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in the Master's office in examining and vouching the accounts. The commission, payable under G. O. 643, was allotted as follows:—To the plaintiff, $375; to the administrator, $300; to the guardian *ad litem*, $157.50. There was a large amount of realty and personaly outstanding, in addition to the amount paid into Court, which, upon realization, produced over $11,850. Upon application under G. O. 643 for an order awarding an additional sum for costs, in the distribution of the estate, on account of the unusual amount of work done and the responsibility borne by the solicitors in the matter, it was referred to the Master in Ordinary to tax to all parties their disbursements, and to fix a proper sum to be paid for their services performed since the making of the original report, the same to be paid out of the moneys belonging to the estate.

H. Cassels, for plaintiff.

J. Hoskin, *Q.C.*, for infant defendants.

(Reported by H. Cassels, Esq., Barrister-at-Law).

[JUNE, 1881.

McLAREN v. CALDWELL.

Injunction—Appeal—Stay of proceedings.

A decree had been made for an injunction restraining the defendant from interrupting the plaintiff in the use of an improved stream, and from using the same. From this decree the defendant appealed, and perfected his security under section 26 of the Court of Appeal Act. While the case was under consideration in the Court of Appeal, the plaintiff issued his injunction under the decree to restrain the defendant from continuing the acts complained of by the bill, and served it; and the defendant now moved against the same, on the ground that execution was stayed under section 27 of the Court of Appeal Act when the security was perfected.

Held, that the 27th section of the Act does not apply to injunctions, whether issued before or after decree, so as to operate as a stay upon perfecting the security mentioned in the 26th section of the Act.

Bethune, *Q.C.* and *Moss*, for the motion.

McCarthy, *Q.C.* (with him *Creelman*), contra.

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[SPRAGGE, C. J. O.,* 11TH JUNE, 1881.

JESSUP v. THE GRAND TRUNK RAILWAY COMPANY.

Railway Company—Land in fee simple on condition of using it for a station —"Place," meaning of.

The plaintiff was the owner of a large tract of land in or near Prescott, and after other lands had been looked at and abandoned, agreed with the contractors, who were buying land and rights of way for the construction thereon of the defendants' railway, "That, in consideration of *placing* the station of the defendants' company for Prescott upon my land on the line of said railway, I will convey to [the contractors] their heirs and assigns in fee simple six acres of the said land for the *purpose* aforesaid." There was no other consideration for the grant, which was made in pursuance of the agreement, on 29th October, 1864. The station was erected in 1855 and used as a station till 1864, when it was closed and a station erected 1½ miles to the eastward. The plaintiff proved damage by the depreciation in the value of the remainder of his land.

Held, under the circumstances, considering among other things that the plaintiff would derive a permanent advantage from the situation of the station on his land, and that he had conveyed in fee simple to the defendants instead of giving them a right of way simply, that the words in italics had been used in a sense indicating permanency, and that the consideration for the grant would not be performed by erecting the station and removing it at pleasure. The proper relief in such a case would be to direct an enquiry as to damages or decree restitution of the lands, if they were not re-occupied by the defendants for the purpose for which they were acquired

It appearing that the station had been so re-occupied pending suit that fact was directed to be recited in the decree, which should reserve leave to the plaintiff to apply to the Court in the event of a future discontinuance of the use of the land for a station.

Bethune, Q.C., for plaintiff.

W. Cassels, for defendants.

JOHNSTON v. REID.

Consolidation of Mortgages—Valuable consideration.

The equity of the holder of two mortgages upon different parcels of the mortgagor's lands, to insist that he shall not be redeemed as to one with-

* The following judgments are upon cases heard before His Lordship when Chancellor.

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out being redeemed as to both, is an equity which prevails on foreclosure as well as on a bill to redeem.

The defendants had two registered mortgages, one upon S. and one upon H., both made by the same mortgagor. The S. property realized more than sufficient to cover the mortgage upon it; while the H. property realized an amount insufficient to cover the mortgage upon it. The plaintiff, having an execution against the mortgagor's lands, took a mortgage upon S. which was registered after the defendant's mortgage thereon, but without notice of the defendant's H. mortgage.

Held, that the defendant had not the right as against the plaintiff to consolidate his mortgage, and make good the loss on the H. sale out of the surplus derived from the S. sale; the policy of the Registry Act being to allow no effect to occult equities.

Held also that, by taking a mortgage and so giving time to the mortgagor, the plaintiff, an execution creditor, was a holder for valuable consideration of the second mortgage.

COLLARD v. BENNETT AND WIFE.

Fraudulent conveyance—Statute of Elizabeth.

The male defendant, carrying on a prosperous business and having chattel property to the value of from $800 to $1,000, his debts not exceeding half that amount, bought land and had it conveyed in 1876 to his wife, who was instrumental by her exertions in increasing the earnings of her husband. All debts existing at the time of the settlement had been paid before the filing of the bill by the plaintiff, whose debt accrued after the settlement.

Held, that the plaintiff was therefore not in a position to impeach the settlement as fraudulent under the Statute of Elizabeth, as it was not proved to have been made with a view to placing the property beyond the reach of future creditors.

In 1877 the male defendant was in difficulties and could not get credit; in 1878 the plaintiff's debt was contracted; and in the same year additions were made to the house on the land, which were paid for by the husband.

Held, that the case came within the principle of *Jackson* v. *Bowman*, 14 Gr. 156.

Bethune, Q.C., for plaintiff.

W. Cassels, for defendants.

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PETERKIN v. MACFARLANE.

Notice.

The rule laid down in *Barnhart* v. *Greenshields*, 9 Moore P. C. 36, that a purchaser is not bound to attend to vague rumours, to statements by mere strangers, but that notice, in order to be binding must proceed from some person interested in the property, has not been rigidly adhered to in this country.

Where a purchaser has such notice as to affect his conscience, to make it inequitable in him to purchase and to take and register a conveyance to himself, when he has knowledge that its effect will be, if allowed to prevail, to defeat a title, legal or equitable, known to him to exist in another, his conveyance will not be allowed to prevail against such title in another.

Boyd, *Q.C.*, for plaintiff.

Moss, for defendant.

PARKS v. MOFFATT.

Conveyance to uses—Construction of—Estate tail—Lease of tenant in tail—Rack-rent.

A conveyance was made to B. and B., "in trust to hold the same for the use of M. A. L., wife of F. L., and the said F. L., for their joint lives, and upon, from, etc., in trust for the use of, etc.," creating an estate tail.

Held, that, notwithstanding the use of the word "trust," B. and B. were grantees to uses only, and that M. A. L. and F. L. took a legal estate in fee tail.

The grantees to uses had made a lease for nineteen years, in which M. A. L. and F. L. had joined for the purpose of consenting thereto. It having been established that the supposed trustees were grantees to uses only,

Held, that the intended lease was inoperative, as the tenant in tail had not created any estate, but had consented only.

The intended lease had not been registered within six months, and the evidence showed that the rent reserved was not a rack-rent, nor five sixths of a rack-rent.

Held, that it could not be supported under the Act relating to assurances of estates tail.

M. A. L. and F. L. had made an assignment of the right to receive the rents and royalties payable under the intended lease, and used words of conveyance of their estate. But,

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Held, that as the lease itself was void the assignment could not operate to validate it.

Moss and Lister, for plaintiff.

McArthur and Moncrieff, for defendants, respectively.

Vacation Court.

[WILSON, C.J., 4TH JUNE, 1881.

In re GALLERNO AND THE TOWNSHIP OF ROCHESTER.

By-law—Publication of—Adjoining Municipality.

A proposed by-law was published in a newspaper in Windsor, a large town, and, for all other than judicial and municipal business, practically the County Town of Essex, in which the Township of Rochester lies. There was no newspaper published either in Rochester or in Sandwich, the County town, or in the *next* adjoining municipality; but there were several published in several small villages, somewhat nearer the Township of Rochester than Windsor, but their circulation was much smaller in Rochester than that of the Windsor paper.

Held, that the publication was sufficient; since, if the meaning of the words "adjoining local Municipality," as used in 42 Vict., cap. 31, sec. 21, were restricted to "*next* adjoining," etc., it would be impossible to publish the by-law; and it did not form sufficient ground of objection thereto that there were other papers published a few miles nearer to Rochester than Windsor was.

H. J. Scott, for the Rule.

Aylesworth, contra.

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[ARMOUR, J., 14TH JUNE, 1881.

In re ALBEMARLE & EASTNOR *et al.*

Separation of Municipalities—Award—Notes of evidence taken by arbitrators —R. S. O., cap. 174, ss. 383, 385.

The provisions of sec. 383 of the Municipal Act, requiring arbitrators to take, make and file, for the information of the court, full notes of the evidence, or a statement that they proceeded upon skill or knowledge possessed by themselves in making their award, are imperative, and the omission to comply with them is fatal to the award.

In re Northumberland and Durham & Cobourg, 20 U.C. R., distinguished.

From reading the award made in this matter, and the evidence and documents filed, it was impossible for the Court to ascertain the reason for the finding of the arbitrators, and so, impossible to consider the matter upon the merits; and the evidence and documents appearing not to support the award.

Held, that the same was invalid.

The arbitrators had made two previous awards, and in each event the matters were referred back to them. A great deal of expense had been incurred by them, a large proportion of which was for fees awarded to themselves. The Court refused to refer the matter back to them; but ordered that it be remitted to the Judge of the County Court, unless Counsel could agree upon such facts as would enable the Court to deal with the matters in dispute.

H. J. Scott, for the award.

Falconbridge, contra.

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Chancery Chambers.

[BLAKE, V.C., 1ST MARCH, 1881.

SINGER v. C. W. WILLIAMS MANUFACTURING COMPANY.

Foreign commission—What must be shewn on application for.

On application for a foreign commission to examine a witness who is travelling, it should be shewn that he will remain at the place to which the commission is directed a sufficient time to allow of its due execution.

Hoyles, for the motion.

Watson, contra.

[THE CHANCELLOR, 11TH MAY, 1881.

In re FIELD.

Administration in York—Further directions—Costs of.

An administration matter in the County of York must come before the Court upon Further Directions, there being no provision, similar to that in orders 638 and 639, empowering the Master in Ordinary to finally dispose of all matters connected with the estate; and the parties are entitled to the costs of and incidental to the Hearing on Further Directions in addition to the Commission provided for by G. O. 643.

ORDER.—"That the purchase money be applied * * 4th. In payment of the commission and disbursements of the [administratrix and the guardian *ad litem*] to be allowed under G. O. 643, and also the extra costs occasioned by the hearing of this clause on F. D. to be taxed."

H. Cassels, for administratrix.

Plumb, for infants.

[31ST MAY, 1881.

TRAVISS v. BELL.

Lunatic—Order to produce.

Held, affirming the order of the Referee, that where a person of unsound mind, not so found, sues by next friend, a præcipe order to produce issued by the defendant, is regular, and will not be set aside.

Semble, that it would be satisfied by the oath of the next friend.

Ewart, for the appeal.

H. Cassels, contra.

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[21ST JUNE, 1881.

FULLER v. McLEAN.

Report made during Vacation—Validity of.

Held, affirming the order of the Referee, that a report, made during the long Vacation, in contravention of G. O. 425, which requires the Master's Office to be closed at that time, is, as against a party having no notice of the proceedings, null and void.

C. M. Rae, for the appeal.

H Cassels, contra.

In re IDINGTON & MICKLE, SOLICITORS.

Taxation of solicitor and client's bill—Reference—Amending bill.

A bill of costs between solicitor and client will not be referred to the Master in Ordinary for taxation against the provisions of R. S. O., cap. 140, sec. 33, which enacts that it shall be referred to the proper officer in the county in which any of the business charged for was done.

Upon payment of all costs incurred by the applicant up to this time, the solicitors to be at liberty to amend their bill or deliver a new one.

H. Cassels, for the application.

Hoyles, contra.

[25TH JUNE, 1881.

In re FERGUSON, AN INFANT.

Custody of Infant—Imbecility of Parent.

While the undoubted natural right of a father to the custody and guardianship of his child is undisputed, and while the law imputes ability and inclination to the parent to perform his duty to his child, the right is yet founded upon his actual capacity to discharge this duty, and under certain circumstances the superior claim to the custody of his offspring may be suspended while the incapacity lasts

A child three years old was placed with its maternal grandparents, who were childless, after the death of its mother. They were comfortably off, treated the child kindly, were willing to educate it, and the grandfather had made a will largely in its favour. The father was suffering, and was much enfeebled both mentally and physically, from the effects of paralysis;

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and on examination he did not seem to comprehend what the effect of these proceedings was. He had been supported by the persons in whose custody the child was for some time, and no scheme for the future welfare of the child was proposed on his behalf.

The Court refused to make any order changing the position of the parties, as it appeared to be more for the welfare of the child that the father should not have the custody.

Counsel for respondents requested that the petition be dismissed, as it would appear on the files as a pending proceeding if no order were made; whereupon an order was made dismissing the petition.

Hoyles, for the petition.

Symons, contra.

[FERGUSON, V.C., 16TH JUNE, 1881.

MACDONALD v. WORTHINGTON.

Appeal from decree—Money in Court—Interest on—Security for.

A decree was made which, among other things, directed the payment out to the defendant J. W. of a large sum of money, paid into Court pending the suit. The plaintiff appealed from the decree and, under an order allowing him to do so, paid into Court four hundred dollars as security for the cost of appeal.

Subsequently an order was made that, upon the plaintiff's furnishing security to the amount of two hundred dollars for the difference between Court interest and the legal rate, the proceedings be stayed so far as the order for payment out of the money in Court was concerned. From this order the plaintiff appealed.

Held, affirming the decision of the Referee, that he had power on making the order to impose such a condition; and that, inasmuch as the money remained in Court for the plaintiff's own protection, it was not unreasonable that such security should be given.

A. M. Macdonald, for plaintiff.

H. Hassels, for defendant.

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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

In the Supreme Court of Canada.

[*Reported by* GEO. DUVAL, ESQ., *Advocate, Reporter to the Court.*]

ONTARIO.]

GRAND TRUNK RAILWAY CO. v. FITZGERALD.

Agreement—Additional parol term—Conditions—Carriers — Wilful negligence.

The respondents sued the appellants for breach of contract to carry petroleum in covered cars from London to Halifax, alleging that they negligently carried the same upon open platform cars, whereby the barrels in which the oil was were exposed to the sun and weather and were destroyed. At the trial, a verbal contract between plaintiffs and defendants' agent at London was proved, that the defendants would carry the oil in covered cars with despatch. The oil was forwarded in open cars, and delayed in different places, and in consequence a large quantity was lost. On the delivery of the oil, the plaintiffs signed a receipt note which said nothing about covered cars, and which stated that the goods were subject to conditions endorsed thereon, one of which was, "that the defendants would not be liable for leakage or delays, and that the oil was carried at the owner's risk."

Held, per Sir Wm. J. Ritchie, C.J., and Fournier and Henry, JJ., that the loss did not result from any risks by the contract imposed on the owners, but that it arose from the wrongful act of the defendants in placing the oil on open cars, which act was inconsistent with the contract they had entered into, and in contravention as well of the undertaking as of their duty as carriers.

Per Strong, Fournier, Henry and Gwynne, JJ.—The evidence was admissible to prove a verbal contract to carry in covered cars, which contract the agent at London was authorized to enter into, and which

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must be incorporated with the writing so as to make the whole contract one for carriage in covered cars.

McMichael, Q.C., and *James Bethune, Q.C.*, for appellants.

Glass, Q.C., and *Fitzgerald*, for respondents.

ERB v. GREAT WESTERN RAILWAY CO.

Shipping note—Fraudulent receipt of agent—Liability of company.

C., an agent of respondents' at Chatham, and a partner in the firm of B. & Co., caused printed receipts or shipping notes in the form commonly used by the Railway Company to be signed by his name as the Company's agent, in favour of B. & Co., for flour which had never in fact been delivered to the Railway Company. The receipts acknowledged that the Company had received from B. & Co. the flour addressed to the appellant, and were attached to drafts drawn by B. & Co., and accepted by appellants. C. received the proceeds of the drafts and absconded.

Held (Fournier and Henry, JJ., dissenting), that the act of C. in issuing a false and fraudulent receipt for goods never delivered to the Company, was not an act done within the scope of his authority as the Company's agent, and the latter were therefore not liable.

James Bethune, Q.C., for appellant.

C. Robinson, Q.C., for respondents.

QUEBEC.]

COTE v. MORGAN.

Prohibition to Municipal Corporation—Assessment Roll.

In 1875, a valid assessment roll for a municipality was made, which by law continued to be in force for three years. On complying with certain formalities, the Municipal Council had power to amend such roll. In 1876, another roll was made, which appeared by the evidence not to be an amended roll, but a triennial roll. The respondents obtained a *bref de prohibition* addressed to the defendants, enjoining them from selling real property of the plaintiffs seized, or from proceeding in any way upon the roll of 1876, or from collecting any taxes thereunder, etc.

On appeal from the Court of Queen's Bench (Appeal side), maintaining the writ, the Court were equally divided, Henry, Taschereau and Gwynne, JJ., holding that the respondents were entitled to the writ, while Sir Wm. J. Ritchie, C.J., and Strong and Fournier, JJ., were of a contrary opinion. The judgment appealed from was therefore affirmed.

Mousseau, Q.C., and *Archambault*, for appellant.

Barnard, Q.C., for respondents.

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VEZINA v. NEW YORK INSURANCE CO.

Life insurance—Insurable interest—Transfer—Wager policy—Payment of premium.

G. applied to respondents' agent at Quebec for an insurance on his life, and having undergone medical examination, and signed and procured the usual papers, which were forwarded to the head office at New York, a policy was returned to the agent at Quebec for delivery. G. was unable to pay the premium for some time, but L., at the request of the agent at Quebec, who had been entrusted with a blank executed assignment of the policy, paid the premium and took the assignment to himself. Subsequently, L. assigned the policy, and the premiums were thenceforth paid by the assignees. Prior to G.'s death, the general agent of the Company inquired into the circumstances, and authorized the agent at Quebec to continue to receive the premiums from the assignees.

Held (Gwynne, J., dissenting), that at the time the policy was executed for G., he intended to affect a *bona fide* insurance for his own benefit, and as the contract was valid in its inception, the payment of the premium when made related back to the date of the policy, and the mere circumstance that the assignee, who did not collude with G. for the issue of the policy, had paid the premium and obtained an assignment, did not make it a wagering policy.

Doutre, Q.C., for appellant.

Bethune, Q.C., for respondent.

NEW BRUNSWICK.]

SWIM v. SHIRREFF.

Contract to cut lumber—Vesting of property—Replevin—Justification—Pleading.

In November, 1874, A. agreed in writing with Muirhead to get logs off land under Muirhead's control, and that they should become Muirhead's property as they were cut. In December following, Maroney agreed with A. to cut and haul logs for him from the same land, A. agreeing to furnish Maroney with supplies to get the logs. Maroney cut and hauled logs under this agreement. A. not having furnished sufficient supplies, the logs were not driven, and, in November, 1875, he and Maroney rescinded their agreement, the latter giving his note for supplies already furnished. The logs were seized in February, 1876, under an attachment issued under the Insolvent Act of 1875 against A. as an insolvent. In May, 1876, Maroney sold the logs to the plaintiff, who drove them to the Miramichi River, where they were replevied by A.'s assignee. The Sheriff remaining in possession, the plaintiff brought trover. The question at the trial, and reserved for the Court, was as to the property in the logs.

Held (Fournier and Henry, JJ., dissenting), that the logs having been cut off lands under Muirhead's control by Maroney as servant of A.,

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Maroney was not the proprietor of the logs, and therefore the plaintiff claiming through Maroney, was not entitled to recover.

Per Sir Wm. J. Ritchie, C.J. The judgment appealed from should be affirmed, but on the following grounds only:—The logs having been seized by the defendant as Sheriff under a writ of replevin issued from the Supreme Court of New Brunswick, he was justified in taking them, and as against the plaintiff there was no wrongful conversion. That this defence was admissible under the pleadings; but if not, that being a technical objection, the record should be amended.

The pleas were, 1. Not guilty. 2. Goods not the plaintiff's. 3. Goods were the goods of the assignee of A., and leave and license of the assignee. 4. Goods were the goods of Muirhead, and leave and license of Muirhead. 5. Goods not goods of plaintiff, but of defendant. Issue.

Per Gwynne, J. Under the second issue the defendant could have proved all matters alleged in the 3rd and 4th pleas; and it was unnecesary to decide whether joinder of issue upon these pleas put in issue anything but a *jus tertii*; for the parties, by what took place at the trial, and the reservation then made for the consideration of the Court, rested the case solely on the question of property without regard to any question whether the defendant acted under any such authority as pleaded.

Barker, Q.C., for appellant.

Weldon, Q.C., for respondent.

ONTARIO.

In the Court of Appeal.

Q. B.] [8TH JULY, 1881.

TRUST AND LOAN COMPANY v. LAWRASON.

Statutory Mortgage—Attornment—Tenancy at will—Distress.

The distress clause in the form given by the Act respecting short forms of mortgages is merely a license to take the goods of the mortgagor. The proper construction of the clause is that it prescribes in a concise referential manner for the disposal of the goods when seized, in the same manner as goods seized for rent.

A mortgage pursuant to this Act, embracing all its clauses, contained, as an addition to the release clause, the following:—"And the mortgagor doth attorn to and become tenant at will to the mortgagees, subject to the said proviso." The "said proviso" was the defeasance clause.

Held (Osler, J., dissenting), that though the relation of landlord and tenant may have been thereby created, yet there having been no rent fixed, the power to distrain did not arise, and the plaintiffs could not claim a landlord's right as against an execution creditor to payment of a year's arrears of interest on their mortgage, before removal by the Sheriff.

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The relation of landlord and tenant may, notwithstanding, be created by proper words between mortgagee and mortgagor, for the *bona fide* purpose of further securing the debt, without being either a fraud upon creditors or an evasion of the Chattel Mortgage Act.

J. K. Kerr, Q.C., and *Wilkes*, for appellant.

Robinson, Q.C., and *Marsh*, for respondents.

GRAND JUNCTION RAILWAY CO. v. THE COUNTY OF PETERBOROUGH.

Provincial Railway—Federal Legislation—Contstitutionality of—Municipal By-law—Validity of.

The Grand Junction Railway Company intended to be wholly within Upper Canada, now Ontario, was amalgamated with the Grand Trunk Railway of Canada, the latter being a Dominion Railway. The former railway not having been built within the time directed, its charter expired. In May, 1870, an Act was passed by the Dominion Parliament to revive the charter of the Grand Junction Railroad Co., but gave it a slightly different name and made some changes in the charter. On the 23rd November in the same year the ratepayers of the defendant municipallties voted on a by-law to grant a bonus to the plaintift company, construction of the road to be commenced before the 1st May, 1872. The by-law was read twice only. At the time when the voting took place on the by-law there was no power in the municipality to grant a bonus. On the 15th February, 1871, the Act 34 Vic. cap. 48 (O) was passed, which declared the by-law as valid as if it had been read a third time, and that it should be legal and binding on all persons as if it had been passed after the Act. On the same day, cap. 30 of the same year was passed, giving power to municipalities to aid railways by granting bonuses. The 37 Vic. cap. 43 (O) was then passed, amending and consolidating the Acts relating to the plaintiff railway, but did not relate to the by-law; and the 39 Vic. cap. 71 (O) extended the time for completion, but did not validate the by-law.

Held, reversing the decision of the Court below, that, as the original charter had expired by effluxion of time and a new corporation must be created, and not the old one revived, and as the railway was a local work of the Province of Ontario, the Dominion Act was unconstitutional and of no validity. There was therefore no railway company in existence to receive the bonus under the by-law, either at the time of voting thereon, or at the time of its legalizing by the 34 Vic. cap. 48 (O). The 37 Vic. cap. 43 (O) was the first Act, by a legislative body having the requisite power, which incorporated the plaintiffs; but no provision having been made, either by that Act or the 39 Vic. cap. 71 (O), for legalizing the by-law in favour of the plaintiffs, they could not recover the bonus from the defendants.

Robinson, Q.C. and *H. Cameron, Q.C.* for the appellants.

Bethune, Q.C. and *Edwards* for the respondents.

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C. P.]

REGINA v. BROWNE.

Extradition—Depositions—Foreign indictment—33 & 34 *Vict., cap.* 52, *and* 36 & 37 *Vict., cap.* 60 (*Imp.*)—31 *Vic., cap.* 94 (*D*).

The defendant was accused by the State of New York of complicity in a crime committed in that State, and was under indictment in the foreign court. Upon the application for extradition, the coroner who had held the inquest in the foreign State himself appeared, and proved his authority to do so, and by oral testimony proved the original depositions taken upon the inquest, which he then produced. A warrant was issued for the defendant's arrest by the district attorney of the foreign State upon the finding of the grand jury of a true bill for murder, but upon what evidence it proceeded was not shown.

Held, that the Canadian Act, which enacts that, upon the return of the warrant of arrest, *copies* of the depositions upon which the original warrant was granted in the United States certified, etc., and attested upon the oath of the party producing them to be true copies, may be received in evidence, does not interfere with the enactments of the Imperial Statute as to original depositions, and that the original depositions in this case were therefore properly admitted.

An accessary before the fact is extraditable, but an accessary after the fact is not. But there was sufficient evidence here to warrant and require extradition.

Held, that the foreign indictment was not admissible as part of the evidence.

Ogden for the appeal.

J. K. Kerr, Q. C. contra.

MORTON v. THE CITY OF ST. THOMAS.

Highways—Dedication—Registered plan.

Apart from the Registry Act, if a person sells lots according to a plan, the purchaser acquires an interest in the streets shown upon the plan adjoining the lots which places them beyond his future control to their injury.

Registration of such a plan does not constitute a dedication of the streets or lanes thereon to the public, and a by-law passed for the opening of such a lane as a public highway, without compensation to the owner, was properly quashed.

Cattanach for the appellants.

Hodgins, Q. C. for the respondent.

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STAFFORD v. BELL.

Provincial Land Surveyor—Negligence—Liability for.

A Provincial Land Surveyor is only bound to bring to the practice of his profession a reasonable amount of skill and knowledge, and is liable only for damage caused by the want of these or by gross negligence.

In order to charge a Surveyor for proceeding upon an erroneous principle in making a survey, it must be shown that the survey is erroneous, and that the plaintiff has, in consequence, suffered damage.

Robinson, Q.C., for appellant.

Read, Q.C., and *W. Read*, for respondent.

SPRAGGE, C.]

HUGHES v. HUGHES.

Executor de son tort—Administration—Personal representative—Administration of Justice Act, sec. 9.

An executor *de son tort* is treated as an executor for the purpose of being charged only, and his presence before the Court will not dispense with that of a regular representative where the estate of an intestate is to be administered.

Where the estate of a deceased person itself forms the subject of a suit, such person is not a party interested in the matters in question in the suit within the meaning of section 9 of the Administration of Justice Act, R. S. O. cap. 49. This section is confined to cases in which the deceased person was in his life-time interested in the matters in question in the suit.

Donovan, for appellant.

E. Blake, Q.C. (with him *Geo. Morphy*), for respondents.

BLAKE, V.C.]

McDONALD v. DAVIDSON.

Allowance to Trustee—Discretion of Judge.

What is a proper compensation to be allowed to a trustee for his management of the trust estate is matter of opinion, upon hearing and considering what he has done; and even if it appear that in granting the allowance the Court below may have erred on the side of liberality, that is not sufficient ground for reversing the judgment.

Remarks upon the bringing of an appeal where the amount in question is somewhat trivial.

Rose, for appellants.

W. Cassels and *K. McLean*, for respondent.

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LAWLOR v. LAWLOR.

Estate tail—Mortgage of, in fee simple—Statutory discharge—Effect of.

A mortgage in fee simple of an estate tail has by statute a tortious operation, conveying to the mortgagee a greater estate than the tenant in tail has.

A registered discharge, under section 67 of the Registry Act, of such a mortgage, which has become absolute by non-payment on the day named, does not vest the estate in the mortgagor barred of the entail, but its effect is to resettle upon the mortgagor his original estate, upon the uses declared by the original settlement.

Plumb, for appellants.

Tupper, for respondent.

PROUDFOOT, V. C.]

McLAREN v. CALDWELL.

All streams Public Highways—Floating timber on—Private Improvements—Private rights—C. S. U. C., cap. 48, sec. 15—Costs—Stay of Execution under Appeal Act.

The plaintiff, a lumberman, was the owner in fee simple of several parcels of land and large tracts of timber. A stream, in parts of the bed of which he had the fee simple, ran through his lands, which, in its natural state, had not the capacity for floating timber upon at any time of the year. The plaintiff, and those through whom he claimed, spent large sums of money in making improvements upon the stream and in deepening it, and thereby made it floatable. The defendant, who owned timber limits in the neighbourhood, claimed the right to float his timber down the stream.

Held, reversing the decision of Proudfoot, V. C. (Burton, J. A., dissenting), that the stream was a public waterway by virtue of C. S. U. C. cap. 48, sec. 15, which, by its terms, applies to all streams, whether of natural capacity to permit timber to be floated down them or not; and that the defendant had the right to float timber down the same during the spring, summer, and autumn freshets, without compensation to the plaintiff. The appeal was allowed without costs, as the improvements had been made and the bill filed relying on the authority of decided cases.

Boale v. *Dickson*, 13 C. P. 337, overruled.

Per Burton, J.A. By the Common Law those streams only which are sufficiently large to be navigable are highways by water, while small streams, being unnavigable and not susceptible of use as a common passage for the public, are not subject to the servitude of the public interest.

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The statute is declaratory only of the Common Law right of every one to use a stream capable, and when capable, in its natural state of transporting timber, etc., and declares also that it is not essential to the public easement that its capacity should be continuous. The Act was not intended to confer any new right.

Sec. 27 of the Court of Appeal Act does not apply to cases of injunction, the decree for an injunction being, so to speak, executed as soon as made.

Bethune, Q.C., and *Moss* for appellant.

E. Blake, Q.C., *McCarthy, Q.C.*, and *Creelman*, for respondent.

C. C. YORK.]

CLARK v. BARRON.

Rule absolute on ground not taken therein.

A verdict was set aside and a non-suit entered, upon a ground not taken as a defence at the trial or in the rule *nisi* to set aside the verdict.

Held, that it was erroneous for the learned Judge in the Court below to have so given effect to the defence. It appearing upon the whole evidence that the plaintiff was entitled to succeed upon the merits, the appeal was allowed, and the rule to set aside the plaintiff's verdict was discharged.

E. Douglas Armour, for appellants.

Falconbridge, for respondent.

C. C. BRUCE.]

HUNTER v. VANSTONE.

New trial—Discretion of Judge—Appeal from.

An application for a new trial is an application to the discretion of the Court; and where the Judge of first instance grants a new trial on account of dissatisfaction with the verdict rendered, his discretion will not be interfered with unless it appears that he is clearly wrong.

H. J. Scott, for appellant.

Creelman, for respondent.

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In Chancery.

[FERGUSON, V.C., 30TH JUNE, 1881.

PLATT v. BLIZZARD.

Specific performance—Costs.

In a suit for specific performance, where it appears that the defendant occasioned the litigation for some reason *dehors* the question of title, the plaintiff will be entitled to his whole costs of suit, even though a title is first shown in the Master's office.

The defendant set up as a defence misrepresentation by the plaintiff, whereby he was induced to enter into the contract, and failed in his proof, but the plaintiff had made untrue statements in the bill, and a title was first shown in the Master's office; the Court was of opinion that the statements in the bill had made no material difference in the case, and that the litigation would have occurred notwithstanding the question of title.

Held, that, as the defendant had occasioned the litigation, the plaintiff was entitled to his costs of suit, including the costs of Further Directions.

Moss, for plaintiff.

W. Cassels, for defendant.

HOLWAY v. HOLWAY.

Alimony—Reduction of amount.

Upon a petition presented eighteen months after the Master's report, to reduce the amount of alimony fixed thereby, on the ground of depreciation of defendant's personal property by payment of alimony and costs, a decline in the current rate of interest, shrinkage in value of real property, and ill-health, where there was conflicting evidence as to the value of the defendant's estate, and his liability to pay; and it appeared that the plaintiff could not live on less than the amount already fixed, the Court refused to interfere.

The learned Judge, being of opinion that the application failed from want of wisdom in the making of it, rather than from any actual frailty therein, dismissed the petition without prejudice to any further application the petitioner might make.

Doherty, for the petition.

Moss, contra.

PIERCE v. CANAVAN.

Estoppel—Binding decision.

B., being the holder of a mortgage on lots D. and E., gave notice of intention to sell under the power therein. The plaintiff, in this suit,

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having become the owner of lot D., filed his bill to redeem B., alleging that the mortgage had been paid, or that a small sum only remained due. In that suit a large sum was found due which the plaintiff paid, and he now filed his bill against successive owners of lot E. to recoup himself. The decree declared that lot E. was primarily liable for the mortgage debt; and it was referred to the Master to ascertain what, if anything, was due in respect of moneys properly paid by the plaintiff in discharge of the mortgage and for costs. It was contended that the proceedings in *Pierce* v. *B.* were not regularly proved. On appeal from the Master in Ordinary,

Held, affirming his ruling, that the decision in the case of *Pierce* v. *B.* was, nevertheless, binding upon the Master and on this appeal, as a case in this Court upon exactly similar facts would be.

J. was the original holder of the mortgage in question. He assigned to F., covenanting that it was a valid and subsisting security for the sum secured thereby. F. assigned to B. through whom the plaintiff now claimed. The original owner, after the assignment of the mortgage by J. to F., conveyed his equity of redemption to J., who conveyed lot D. to one who ultimately conveyed to the plaintiff. He also conveyed lot E. to defendant C., who conveyed to his co-defendant. In the suit of *Pierce* v. *B.*, it was held that J. was estopped by his covenant as against B. from disputing that the face value of the mortgage was due.

Held, that the decision in *Pierce* v. *B.* was binding as to this, and that the defendants in this suit, who claimed the equity of redemption through J., were also so estopped as against the plaintiff claiming through B.

Held also, that this was not a suit upon a matter collateral to the mortgage in question in *Pierce* v. *B.*, but was virtually upon the same deed, and therefore came within the rule as to estoppels by deed.

Held also, that the plaintiff was entitled to recover the costs in *Pierce* v. *B.* which the Master found to have been properly incurred.

J. H. Ferguson and *F. E. Hodgins*, for the appeal.

W. Roaf, contra.

Chancery Chambers.

[FERGUSON, V.C., 30TH JUNE, 1881.

HATHAWAY v. DOIG.

Security for costs—Nominal plaintiff—Insolvency of—Waiver.

The plaintiff occupied with his wife a house belonging to the latter, adjacent to the defendant's factory, where a nuisance was created by the noise of making boilers. Permission had been obtained from the plaintiff by persons interested to use his name for the purpose of proceeding to abate the nuisance, as he was the one most injured thereby. He swore on his examination that he hesitated to do this at first, but after receiving a letter from his medical adviser that his wife's health was suffering from the nuisance, he concluded to commence proceedings, and immediately

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gave instructions therefor. The letter, however, was dated the 27th April, while the bill was filed two days before this. None of the interested parties, who had made affidavits in support of an injunction motion to restrain the continuance of the nuisance, denied the defendant's charge that the suit was brought for their benefit in the plaintiff's name. The learned Judge was satisfied on the evidence that the plaintiff was put forward as a plaintiff for the benefit of the interested parties. The plaintiff was sworn to be worthless, and he merely stated in answer that he was "well able to answer the costs if any should be awarded against" him. He had peronally no legal interest in the cause of suit sufficient to maintain the bill.

Held, on appeal from the Referee reversing his decision, that the defendant was entitled to security for costs.

Pending this appeal, an interlocutory injunction was granted to abate the nuisance, upon which motion the objection that the plaintiff had no *locus standi* was overruled. This holding was cited on this appeal as an authority in the plaintiff's favour that he had personally the right to maintain the suit. After argument but before this judgment, the Court of Appeal reversed the order for an injunction, holding that the plaintiff had no *locus standi*. Both decisions were looked at upon this appeal by the learned Judge in coming to a conclusion as to the defendant's right to security.

The plaintiff alleged title in himself by his bill, but the property actually belonged to his wife. This fact and the circumstances of his poverty were unknown to the defendant when he took a step in the cause by demanding copies of affidavits filed in support of the injunction motion.

Held, that, as this step had been taken in ignorance of the defendant's right to security, there was no waiver thereby.

J. H. Ferguson, for the appeal.

Hoyles, contra.

STINSON v. STINSON.

Trustee's allowance—Appeal from Master—Costs.

A Master may, in a proper case, where the interests are important and the estate large, allow a sum in gross to the trustee for his trouble, instead of giving a percentage.

Where, however, the Master at Hamilton had allowed the trustee a gross sum of $15,400, and the evidence of the trustee, who was also personally interested, did not refer with sufficient particularity to the several properties dealt with, the items of care, management, etc., and the necessity for the same, during the period for which the allowance had been made, the matter was referred back to the Master, with liberty to the trustee to give such further evidence as he might be advised.

The costs of this appeal and all additional costs occasioned in the Master's office to be paid by the trustee.

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THE

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MORTGAGE OR NO MORTGAGE: ADMISSION OF PAROL EVIDENCE.

(Concluded).

THE remaining judgment in *Greenshields* v. *Barnhart* (*a*), the case under consideration, is that of Sir John Robinson, with which Draper, J., (p. 67), briefly expresses his concurrence. The Chief Justice, though disagreeing with the majority of the Judges as to the admissibility of the evidence in that particular case, does not dissent from their statement of the law. The question of "Mortgage or no Mortgage," he says, must not be decided upon parol evidence alone, in the absence of all proof *aliunde* of fraud or mistake, (p. 39). "There must," he says, (p. 30), "be evidence of some fact; something done that cannot be accounted for otherwise than by inferring a new and different agreement than the deed imports."

It may be remarked that, from the view taken of this case by the Privy Council on appeal to that tribunal, it was not necessary to decide this point as to the admissibility of the parol evidence, though the Court declare their impression to be that the evidence was sufficient to establish that the transaction in question was a mortgage (*b*).

(*a*) 3 Gr. 1 (1851).
(*b*) 5 Gr. 99.

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The next case in order of time, namely, *Willard* v. *McNab* (*c*), proceeds on the principles laid down in *Le Targe* v. *De Tuyll* and *Barnhart* v. *Patterson* (*ubi sup.*), but the Chancellor expresses a doubt whether those cases go far enough. On the other hand, in the next case on the point, that of *Holmes* v. *Matthews* (*d*), when it came up on appeal (5 Gr. 1), Robinson, C.J., expresses (p. 32) an opinion that in *Le Targe* v. *De Tuyll*, as in the judgment of Chancellor Blake in the Court below, there was a tendency in the language of the Court to adopt a latitude in dealing with these cases which does not appear to be permitted by the English decisions; and that in his opinion it was not safe to go further in the reception of parol evidence, than is laid down in *Howland* v. *Stewart*, and by the Court of Appeal in *Greenshields* v. *Barnhart;* and his language in the later case of *Bernard* v. *Walker* (*e*) is to the same effect. On the same appeal Macaulay, C.J., adheres to the views expressed by him in *Greenshields* v. *Barnhart*, and again cites *Davis* v. *Symonds* (*f*) as enunciating the true principle, and Burns, J., also declares that little more can be said or added to the views expressed in the two Canadian cases. The case of *Matthews* v. *Holmes* was carried to the Privy Council (*g*), and the parol evidence was held sufficient to show that the assignment was not intended to be absolute, but the judgment chiefly concerns a different point which arose in the case.

At p. 23 of his judgment in this case of *Matthews* v. *Holmes* in appeal, Robinson, C.J., remarks on the propriety of a party who attempts to cut down an absolute conveyance to a mortgage by evidence of conversations and of circumstances *dehors* the deed coming with reasonable promptness, and that he stands more on the footing of a person calling for specific performance of an alleged agree-

(*c*) 2 Gr. 601 (1851).
(*d*) 3 Gr. 379 (1852).
(*e*) 2 E. & A. 138-9.
(*f*) 1 Cox 402.
(*g*) 5 Gr. 108.

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ment, though he is in form suing for redemption; which necessity for promptness is indicated also by the language of the L. C. B. in *Tull* v. *Owen* (*h*).

In his judgment, also, in this case, Burns, J., cites a number of English cases to prove his assertion that in all of them the Judges have made themselves astute to find something on which to attach the parol evidence, and asks (p. 76) why this is so, if in cases of mortgages parol evidence is receivable without any fact, act, or conduct of the mortgagee extrinsic the deed, established inconsistent with the deed. Afterwards at p. 80, he again refers to that argument, which I mentioned above at p. 408 as used by Esten, V.C., in *Stewart* v. *Horton*, and disputed by Sir John Robinson in *Matthews* v. *Holmes*. Burns, J., also disputes it, but in the light of certain English cases it seems fitting to consider it somewhat further.

The proposition that the effect of the absolute conveyance may be controlled by parol evidence branches out, he says, (p. 78), into two lines of argument; first, that where there is an agreement for a mortgage, and that is carried out by an absolute conveyance with a verbal agreement that there may be a redemption, the execution of the conveyance may be considered as part performance of the contract, so that the Court will enforce the other part; secondly, that it is in case of mortgage *ipso facto* a fraud in the mortgagee to take an absolute conveyance, although it may be done upon the express agreement, and by the desire of the mortgagor, that his right to redeem shall rest entirely in parol without any writing. The first line of argument he disposes of by saying that the doctrine of part performance is based upon the fact that the agreement is a completed agreement, whereas the execution of the deed is no part performance of any completed agreement, but must necessarily be the agreement itself, since with regard to an interest in land there can be no agreement by parol. The second is that now in question, which he declares (p. 80) to be obviously reasoning in a circle; and the same remark is

(*h*) 4 Y. & C. 203 (1840).

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made by the Court in *Howland* v. *Stewart* at p. 68. The argument, as Burns, J., gives it in *Matthews* v. *Holmes*, is this:—"Parol evidence must first be received to prove that the absolute conveyance was intended as a mortgage; that being established the inference then is, that a fraud was intended, and because a fraud is meant to be committed, therefore the evidence is receivable to prove the transaction to be a mortgage." He declares the nearest approach to such a position to be the case of *Pember* v. *Mathers* (*i*), which, however, he easily shows is far short of what is contended for in the above argument, because the instrument in that case was executed upon the consideration that the defendant had engaged to give a bond to idemnify, to obtain which the bill was filed.

There are, however, certain English cases which, it is submitted, appear to support this argument, and which are not referred to by Burns, J., in this case, nor by Robinson, C.J., in that passage of his judgment in this case referred to at p. 408 of the first part of this article; nor are they mentioned as having been referred to in the arguments of counsel. Space will not permit much discussion of the matter here, but I would refer to *Young* v. *Peachy* (*j*), in which Lord Hardwicke refers in support to such cases as *Maxwell* v. *Montacute* (*k*), (to be presently noticed), which, however, is perhaps distinguishable in the same way as that in which Burns, J., distinguishes *Pember* v. *Mathers*. But I would refer especially to the case of *Lincoln* v. *Wright* (*l*), where Turner, L. J., distinctly says, "It is in the eye of this Court a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud;" which is followed in the recent case of *Booth* v. *Turle* (*m*), where the case of *Davies* v. *Otty* (*n*) is also

(*i*) Bro. C. C. 54.
(*j*) 2 Atk. 254 (1741).
(*k*) Prec. Ch. 526.
(*l*) 4 De G. & J. 16 (1859).
(*m*) L. R. 16 Eq. 182 (1873).
(*n*) 35 Bea. 208 (1865).

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referred to; and to these might be added Lord Hardwicke's language in *Walker* v. *Walker* (*o*).

Whether, however, the validity of this 'circular' argument can still be regarded as a moot point or not, the balance of authority in our Courts appears to be against it: and it is to *Howland* v. *Stewart* and *Greenshields* v. *Barnhart* that we must apparently look for the most approved statements of the proper principle as to the admission of parol evidence in these cases of "mortgage or no mortgage." But before proceeding further, it must be observed that in *Howland* v. *Stewart* (*p*) a distinction is drawn in regard to the case of *Maxwell* v. *Montacute* (*supra*) and other English cases of the same kind and date, such as *Walker* v. *Walker* (*q*) and *Dixon* v. *Parker* (*r*). In *Maxwell* v. *Montacute*, under a mortgage in the old way, *i. e.*, where there was first an absolute conveyance executed, and then a separate deed of defeasance, the mortgagor had executed the former, and then the mortgagee refused to execute the defeasance, but Lord Nottingham decreed that he should do so. In *Howland* v. *Stewart* the facts were of a similar kind, yet since no *acts* of the grantee were inconsistent with the supposition that the conveyance was intended to be absolute, the Court refused to admit parol evidence that he had verbally agreed to execute a defeasance or bond for re-conveyance on payment of the consideration; and Burns, J., in delivering judgment, remarked that the old cases above referred to must be interpreted with reference to the then existing circumstances and modes of conveyance.

The cases, then, to continue, appear to establish that the true rule is as follows:—In order to render parol evidence on the question of "mortgage or no mortgage" admissible in Courts of Justice, it is necessary first to show by something which does not depend upon parol evidence, that

(*o*) 2 Atk. 99 (1740).
(*p*) 2 Gr. 61 (1850).
(*q*) 2 Atk. 99 (1740).
(*r*) 2 Ves. Sr 225 (1750).

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there is reason to believe the instrument, owing to some fraud, mistake, accident or surprise, other than a mistake in law (*s*), does not truly speak the agreement made,—or that subsequent dealings have taken place between the parties inconsistent with the fact of the deed being absolute, and causing a fraud to be committed on the mortgagor in case the parol evidence is excluded (*t*), and then parol evidence will be received to shew what relief ought to be granted (*u*).

And it appears that all the possible ways in which this may be done, or at all events, that all the different ways in which this has already been done in the reported cases, and a foundation for parol evidence thus laid where it was desired to adduce such evidence, may conveniently be classified under three principal heads, which are suggested by a passage in the judgment in *Howland* v. *Stewart*, and also by the words of Sir John Robinson quoted above at p. 409. It must, however, be remembered that there are few cases the facts in which fall exclusively under one head only. They are as follows:—(1). Where there has been some note in writing (which *Holmes* v. *Matthews* seems to show need not necessarily be written or signed by the parties or their agent); or where there has been some other act of the parties or their agents, sufficient to attach the parol evidence to under the requirements of the above rule. Most of the illustrations of this head appear to range themselves under three subdivisions, viz.: (i) Where there is some writing of the character indicated. (ii) Where there has been a possession of the property comprised in the conveyance, of the character indicated. (iii) Where there has been a repayment of the character indicated. (2). Where there is something in the language of the instrument itself, or something attached to it, which irresistibly leads the mind to believe the intention of the parties to have been different from the legal conclusion of the instru-

(*s*) *Greenshields* v. *Barnhart*, at pp. 39 and 72, and cases there cited.
(*t*) *Barnhart* v. *Patterson*, at p. 469.
(*u*) *Howland* v. *Stewart*, at p. 70.

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ment. (3). Where there is something in the answer of the defendant irreconcileable with the deed.

It is proposed to consider the cases illustrating the principle under these three several heads in their order.

(1). Where there has been some note in writing or some other act of the parties.

The mere *viva voce* evidence of witnesses swearing to a verbal understanding of the parties contrary to the express language of a deed, is not sufficient (*v*).

(i) Where there is some writing of the character indicated by the rule. Parol evidence does not become admissible in this class of cases because of a note in writing sufficient to take the case out of the Statute, but because of the existence of some fact which evinces the real intention of the parties to have been different from that expressed by the deed, and which thus raises, as it has been expressed, an equity *dehors* the deed. Accounts kept do not constitute a memorandum within the Statute, and yet they are sufficient for this purpose (*w*).

In *Vernon* v. *Bethell* *x*, the writing which supplied the requirements of the rule, was a letter written by the grantee shortly before the deed in which he said, "my account is swelled to so enormous an amount that I must have possession of the estate, *in order to save something for your family.*" Lord Eldon held the plaintiff could not have meant to take an absolute purchase for his own benefit. *Gordon* v. *Selby* (*y*) also illustrates this heading. It is, however, *Cripps* v. *Jee* (*z*) that is especially noticed in our Courts in this connection. In this case it was desired to admit the parol evidence of the attorney, Hunt, who prepared the deed in question, which would prove beyond doubt that the conveyance was really only intended for a

(*v*) *Gilmour* v. *Hayes*, 6 O. S. 631 (Hil. 6 Vict.); *Howland* v. *Stewart*, 2 Gr. 61; *Greenshields* v. *Barnhart*, 3 Gr. 1, at pp. 30 and 39.

(*w*) *Holmes* v. *Matthews*, 3 Gr. 379 (1852), per Blake, C., at p. 385.

(*x*) 2 Ed. 112 (1762).

(*y*) 11 Bl. N. S. 351 (1837).

(*z*) 4 Br. C. C. 472 (1793).

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security. The plaintiff (grantor) produced as evidence an entry in a book kept by the grantee to the purport following:—"1782, May 15, paid Mr. O. a year's interest on £300 (the consideration mentioned in the deed), on W. Cripps' (plaintiff and grantor) account, £15.—Received of W. Cripps' £7 10s., due £7 10s.;" and also a note and bond given by the executrix of the deceased grantee, and by the surviving grantee in which they acknowledged themselves trustees of Cripps' estate. The M. R. said that here was the equity *dehors* the deed, which Lord Thurlow desired in *Irnham* v. *Child* (*a*) Here was a writing by the parties themselves in which they acknowledged that the transaction had not been as represented by the deed. This introduced Hunt's evidence, which showed the grantees had been guilty of "a pious fraud" in taking an absolute conveyance.

In *Irnham* v. *Child* an annuity was granted by a deed absolute in form, because that both parties thought that if a provision for redemption appeared in the face of it, it would appear usurious. Lord Thurlow dismissed the bill, observing that there was no case of a mistake in law like this being held to admit the party to come into a Court of Equity. And this case, and that of *Portmore* v. *Morris* (*b*), which was a similar one, and *Hare* v. *Shearwood* (*c*), which was held to fall under the same principle, illustrate the distinction between the case where, proper foundation being laid, parol evidence is admissible, and those where the assignment is made in absolute form, *not* through any fraud or mistake, but with the concurrence of the grantee. And in this connection reference should be made to the language of McLean, J., quoted *supra* p. 411, and to that of the L. C. B. in *Tull* v. *Owen* (*d*), at p. 208, and also to the remarks of Robinson, C.J., in *Matthews* v. *Holmes* (*e*).

(*a*) 1 Br. C. C. 92 (1781).
(*b*) 2 Br. C. C. 218 (1787).
(*c*) 1 Ves. Jr. 241 (1790).
(*d*) 4 Y. & C. 193 (1840).
(*e*) 5 Gr. 1, at pp. 40-1.

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Our leading case of *Le Targe* v. *De Tuyll* illustrates all three subdivisions of the head we are considering, since there were there writings, possession, and repayment. The deed was executed in 1835, the grantor remained in possession till 1838, and made various payments on account of the debt, for some of which he held the receipts of the grantee or the grantee's clerk. In 1838 the grantee obtained judgment in ejectment, which he held till 1841, when the bill was filed. Blake, C., held that (apart from the dealings that had taken place upon the faith of the contract sought to be established) it is clearly settled that the fact of the transaction being in reality a mortgage, may be established by any writing under the hand of the mortgagee, no matter whether connected or unconnected with the deed. And he expresses an opinion that although the cases are somewhat obscure they seem to go further, warranting the proposition that where it is clear from the written evidence that the agreement really made between the parties was not that stated by the deed, parol evidence will be admitted; and he cites Lord Kenyon's language in *Cripps* v. *Jee*. See also *Hardwood* v. *Wallis*, cited per curiam in *Howland* v. *Stewart* (*f*).

The next Canadian case of *Barnhart* v. *Patterson* also illustrates all three subdivisions of the first head, but the possession was held there, and the repayments were made, by the father of the grantor, as his agent, as was alleged. Esten, V.C., admitted parol evidence on the ground of the subsequent acts of the parties, but with reference to the accounts produced, being entries in the books of the grantee of payments made to him, he said they did not appear to him sufficient *per se* to warrant the admissibility of parol evidence according to the rule laid down in *Cripps* v. *Jee*, and recognized in *Le Targe* v. *De Tuyll*, because they all appeared to be consistent on the face of them, with the fact of an absolute purchase. In appeal in this case, *Greenshields* v. *Barnhart* (*g*), Robinson, C.J., also refers, at p.

(*f*) 2 Gr. 71.
(*g*) 3 Gr. 1.

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31, to the above-mentioned entries, but said they could not rightly be taken as evidence that the agreement must have been different from that imported by the deed, because there was no proof when they were made, nor was it clear for what purpose they were made, and *Cripps* v. *Jee* by no means warranted the taking such evidence as decisive. The other Judges in appeal did not make special reference to these entries.

Willard v. *McNab* (*h*), the next Canadian case on the subject, turned on certain written evidence in the grantee's handwriting, which showed that the consideration in the deed was charged by him against the grantor as a debt and paid by the latter, who was credited with the rents and profits, and charged with the repairs,—and this was held sufficient on the authority of *Cripps* v. *Jee*, and also as showing that the grantee had suffered the grantor to act on the faith of the parol agreement, which it was the object of the suit to enforce.

Holmes v. *Matthews* (*i*) is a specially important case in this connection, because the writing, which was there held sufficient to let in parol evidence, was not made by either of the parties to the deed in question or by their agent. It was a memorandum by the clerk of the solicitor, who acted for both parties, made at the time of the transaction, which set out the account between the grantor and the grantee at the time, and spoke of the matter as a loan. Blake, C., held this memorandum alone sufficient under *Cripps* v. *Jee*, and cases of that class, to admit the parol testimony, and remarked that a note in writing sufficient for that purpose need not necessarily be one sufficient to take the case out of the Statute of Frauds. He even went further, and said that on the principle of *Le Targe* v. *De Tuyll* he thought he would have felt it impossible to dismiss the bill in the face of the evidence of the solicitor alone, who was able to testify unequivocally to the transaction being a mortgage and to explain it fully. This deci-

(*h*) 2 Gr. 601 (1851).
(*i*) 3 Gr. 379 (1852).

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sion was reversed in appeal (*j*), but not on the point of the admissibility of the evidence. Sir John Robinson, however, deplored (p. 32) a seeming tendency to adopt a latitude in dealing with these cases unauthorized by the English decisions, and, in opposition to the other Judges, held the evidence inadmissible. The latter, however—the judgment of one of whom is reported out of its proper place in the form of a note, in 5 Gr. 107—were of a contrary opinion, and the Privy Council, on appeal to it (*k*), confirmed this view. *Hardwood* v. *Wallis* (*l*) may be compared and contrasted with this case.

In *Bernard* v. *Walker* (*m*), there is another Canadian decision on the principle of *Cripps* v. *Jee*, but the writing there relied on was the affidavit of *one* of the grantees filed on an application for extension of time for payment, made on the occasion of a prior mortgagee instituting proceedings to foreclose. This, said Sir J. Robinson who alone delivered judgment in appeal (p. 145), was sufficient to establish against Thompson (the deponent) that the transaction was by way of security, and not an absolute conveyance, and although on general principles (p. 146) the admission of one tenant in common would not be binding on the other, yet it would be arriving at a strange result, and one opposed to common sense, if the deed under the same words applying to both grantees must be held on any evidence of its intent to have conveyed to one grantee an absolute estate, and to the other a qualified or conditional estate only. But, he held, apart from this that Bernard (the other grantee) had by his conduct supplied a sufficient foundation for the reception of parol testimony (p. 149). Draper, C.J., however, dissented. Later cases illustrating this subject are *McAlpine* v. *How* (*n*) and *Rose* v. *Hickey* (*o*).

(*j*) 5 Gr. 1 (1853).
(*k*) 5 Gr. 108.
(*l*) 2 Vern. 195.
(*m*) 2 E. & A. 121 (1862).
(*n*) 9 Gr. 372 (1862).
(*o*) 3 App. R. 309 (1878).

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It is now, however, time to proceed to illustrate shortly the remaining two subdivisions of the first head, viz.:—

(ii) Where there has been a possession, or (iii) where there has been a repayment of the debt, sufficient to satisfy the requirements of the rule; and it seems best to treat these two subdivisions together.

It appears that generally in case of a mortgage by absolute conveyance either of these facts by itself would be sufficient to let in parol evidence. In *Le Targe* v. *De Tuyll* (*p*), Blake, C., reviews the cases which show the grounds on which part performance has been treated as taking cases out of the Statute, and says that he "feels strongly that to suffer a mortgagor who continues in possession under a parol contract for redemption, to be treated as a trespasser and charged with rents and profits would be to sanction a fraud as flagrant as could occur in any case that can be suggested." But he adds that, however this may be, no doubt can exist when the parties have so dealt as to render such continued possession clearly referable to the parol agreement, as *e.g.* by the demand and payment of interest, or the demand and payment of the debt, or any portion of it, as was the case there; and he goes further, and says that the Court were of opinion that the peculiar nature of this species of contract is such as renders payment of interest or payment of principal under the parol contract such an act of part performance as takes the case out of the Statute. And in *Barnhart* v. *Patterson* (*q*), Esten, V.C., speaks to the same effect. In *Maxwell* v. *Montacute* (*r*), it is said that the fact of the grantee demanding interest for his money, instead of entering and receiving the profits, will be admitted to explain the conveyance; while in *Cotterell* v. *Purchase* (*s*), the Lord Chancellor remarks that, had the plaintiff continued in possession any time after the execution of the deeds, he would have been

(*p*) 1 Gr. 227, at p. 234.
(*q*) 1 Gr. 459.
(*r*) Pre. Ch. 526 (1719).
(*s*) Cas. temp. Talb. 61 (1735).

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clear that it was a mortgage. And in *Greenshields* v. *Barnhart* (*t*), Esten, V.C., at p. 74, after mentioning that on the the usual principle of equity, parol evidence would be admissible in cases of mortgage by absolute conveyance to show whether the consideration mentioned in the deeds is the real consideration, and how and by whom it has been paid (*u*), speaks of the last-mentioned case as one "not to be got over." And Sir J. Robinson, in his judgment (p. 41), also seems to allow that possession alone may be sufficient, if unequivocally showing the existence of some agreement to which it must be referred, and he cites *Morphett* v. *Jones* (*v*). *Allenby* v. *Dalton* (*w*) seems on the other hand to have turned on the fact of payment of interest alone, as showing a certain transaction to have been a loan and not a conditional sale. As a rule, however, in most cases where one of the facts has appeared there seems to have been the other also, as in the instances mentioned in discussing the first sub-division of this head, and as in *Lincoln* v. *Wright* (*x*), and in *Papineau* v. *Gurd* (*y*), which was followed in the similar case of *McGill* v. *McGlashan* (*z*).

The next principal head of the three above mentioned, may be more briefly illustrated. It is:—

(2). Where there is something in the language of the instrument itself, or something attached to it which irresistibly leads the mind to believe the intention of the parties to have been different from the legal conclusion of the instrument.

A good illustration of this is *Franklyn* v. *Fern* (*a*), referred to in *Holmes* v. *Matthews* (*b*). Here there was an

(*t*) 3 Gr. 1.
(*u*) Cf. *Myles* v. *Noble*, 1 C. L. T. 214.
(*v*) 1 Swan. 172.
(*w*) 5 L. J. K. B. 312 (1827).
(*x*) 4 De G. & J. 16 (1859).
(*y*) 2 Gr. 512 (1851).
(*z*) 6 Gr. 324.
(*a*) Barn. 30 (1740).
(*b*) 3 Gr. 379, 385.

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absolute assignment of a lease, but with an indorsement on it purporting that the deed was made to indemnify the assignee against a certain bond which he had given to answer for a debt of the assignor; which indorsement the report in one place states to have been signed only by the assignor; (but as to this *quære;* see the judgment ad ex.). Two days after the assignor signed a writing, whereby he directed the tenants to attorn to the assignee, and on that day the assignee was put into possession, and the tenants attorned to him. The bill was brought to redeem, and Parker, J., held the plaintiff entitled to relief, for that the endorsement, though only signed with the handwriting of the party, was sufficient to shew that in equity at least, the transaction was only a mortgage, and the writing signed two days after had not altered its nature. *Whitfield* v. *Parfitt* (*c*) was another similar case, except that the indorsement (on an absolute bill of sale of a ship) was signed by an agent of the assignee. *England* v. *Codrington* (*d*) also illustrates this head, inasmuch as the agreement there in question recited that the covenantee had agreed to *advance* and pay the sum named, in order to pay off and discharge certain sums due from the covenantor to a third party; and it is cited in this connection by Burns, J., in *Howland* v. *Stewart* (*e*).

This case, however, is still more in point as an illustration of the third head, viz., (3). Where there is something in the answer of the defendant irreconcileable with the deed. *England* v. *Codrington* is a good illustration of this, from the very indirect nature of the admissions in the defendant's answer, on which the case principally turned. It does not, however, appear to be necessary to adduce many illustrations under this head. The question in each case obviously is, whether the answer of the defendant can really be said to admit that the transaction was not as

(*c*) 4 De G. & Sm. 242 (1851).

(*d*) 1 Ed. 169 (1758).

(*e*) 2 Gr. 61, at p. 70.

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represented in the deed, whether it can in fairness have this stress laid upon it (*f*).

Before concluding this article, it may be well to carry out the intention announced in the first part of it, and briefly refer to the way Mr. Fisher (*g*) states the law on the subject under discussion. He keeps free from the danger of misconception incurred by the old text writers, commented on in *Le Targe* v. *De Tuyll* and the other Canadian cases, by saying emphatically that parol evidence will be admitted to show the omission of a defeasance or proviso for redemption, "if, but not unless," the omission be alleged to have been obtained by fraud. But he fails to point out that before such parol evidence to show that a conveyance absolute on its face was really intended merely as a mortgage can be admitted, it is necessary to lay a foundation for it in evidence other than parol, in the manner required by the above rule. Thus he says that one class of cases in which an absolute conveyance may be construed as a mortgage consists of those in which "there is evidence of the non-execution or erasure by mistake or fraud of an intended defeasance or proviso for redemption," —and that another class consists of those in which "a separate defeasance or agreement for a right of redemption has been made by the mortgagee or his duly authorised agent, either in writing or verbally." But a consideration of the judgments in the Canadian cases shows that this language requires modification.

In conclusion, it may be observed that the American authorities on the subject of this article will be found commented on in the judgments in *Le Targe* v. *De Tuyll*, at p. 232, and in *Matthews* v. *Holmes*, at pp. 36-37, and 81.

A. H. FRAZER LEFROY.

(*f*) *Matthews* v. *Holmes*, 5 Gr. 38, 88. Illustrations of it will also be found in *Hampton* v. *Spenser*, 2 Vern. 287 (1693); *Price* v. *Price*, 15 L. J. Ch. 12 (1845); *Haigh* v. *Kaye*, L. R. 7 Ch. App. 469 (1872); *Holmes* v. *Matthews*, 3 Gr. 379; *Matthews* v. *Holmes*, 5 Gr. 1 (see esp. pp. 52, 88); *Papineau* v. *Gurd*, 2 Gr. 52.

(*g*) On Mortgages; 3rd Ed. pp. 13-15

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TITLE TO LANDS UNDER FRESH WATER LAKES AND PONDS.

(*From the Central Law Journal.*)

In the Northwestern States there are innumerable lakes and ponds, which are largely resorted to for pleasure, and for the opportunities they furnish for the taking of game and fish. The scenery about them is, in most cases, picturesque and inviting, and they become favorite locations for residence. On some the navigation is valuable for business purposes; others are navigated for pleasure only. In surveying the public domain for the purposes of sale, the government caused all that were too large to be embraced within a single subdivision of a section, to be meandered at the water line, and the dry land only was measured for sale. The waters of many of these lakes and ponds are receding gradually, and some, after a time, disappear. Under these circumstances, the question who owns the bed is one of considerable importance in the northwest, and is of interest in other parts of the country, though not so likely elsewhere to become the subject of litigation.

So far as concerns fresh water streams, the rule of the common law is clear and unquestionable. The owner of the bank owns to the thread of the stream, subject to the public rights of navigation, and perhaps of fishery; and he may make of it any use not inconsistent with the public easement (*a*).

(*a*) *Bickett* v. *Morris*, L. R. 1 H. L. Sc. Ap 47; *Palmer* v. *Mulligan*, 3 Caines 307; *Jackson* v. *Halstead*, 5 Cow. 216; *Horne* v. *Richards*, 4 Call. 441; *Browne* v. *Kennedy*, 5 H. & J. 195; *Arnold* v. *Mundy*, 6 N. J. 1; *Gough* v. *Bell*, 21 N. J. 160; *Young* v. *Harrison*, 6 Ga. 141; *Adams* v. *Pease*, 2 Conn. 281; *Chapman* v. *Kimball*, 9 Conn. 38; *Rice* v. *Ruddiman*, 10 Mich. 126; *Lorman* v. *Benson*, 8 Mich. 18; *Hayes* v. *Bowman*, 1 Rand. 417; *McCullough* v. *Wall*, 4 Rich. (S. C.) 68; *State* v. *Gilmanton*, 9 N. H. 461; *Norway Plains Co.* v. *Bradley*, 52 N. H. 85; *Boston* v. *Richardson*, 105 Mass. 351; *Houck* v. *Gates*, 82 Ill. 179; *Delaplaine* v. *Railroad Co.*, 42 Wis. 214; *Morgan* v. *Redding*, 5 Sm. & Mar. 195; *Magnolia* v. *Marshall*, 39 Miss. 109; *Birney* v. *Snyder*, 3 Bush 266; *Granger* v. *Avery*, 64 Me. 292; *O'Fallon* v. *Daggett*, 4 Mo. 343; *Ross* v. *Faust*, 54 Ind. 471.

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If there are islands in the river, they belong to the owner of the bank on whose side of the centre they lie; or, if they divide the main channel, they will themselves be divided in ownership between the bank proprietors (*b*). And the above rules apply without regard to the magnitude or importance of the river whose bed or islands are in question (*c*). In North Carolina and Iowa, however, a different rule is applied; and it is held that, in the case of large rivers whose chief characteristic is their navigability, the line of private ownership is the bank, and not the thread of the stream (*d*); and such seems to be the rule in Indiana and Pennsylvania also (*e*). The judiciary of the State of New York also after considerable vacillation, is, at last, unmistakably arrayed on the same side of this important question (*f*). Whether the line of low water mark, or that of high water mark, is to be considered the boundary when the thread of the stream is not, is a question on which there are differences of opinion, and we shall not enter upon it here.

If the bank owners do not own the bed of the stream, it will be conceded that it is owned by the State. Whenever the United States was original owner, the right passed to the State on its admission to the Union, with all other rights pertaining to the eminent domain (*g*). But whether the State owns it as proprietary, or only as sovereign, is a point of no little interest. If it owns the soil as proprietary, it may perhaps sell it for private improvement and

(*b*) *Ingraham* v. *Wilkinson*, 4 Pick. 268; *Trustees* v. *Dickinson*, 9 Cush. 548.

(*c*) *Rundle* v. *Canal Co.*, 1 Wall. Jr. 275; *Adams* v. *Pease*, 2 Conn. 481; *Schurmeier* v. *Railroad Co.*, 10 Minn. 82; *Houck* v. *Yates*, 82 Ill. 179; *Arnold* v. *Elmore*, 16 Wis. 509; *Gas Light Co.* v. *Industrial Works*, 28 Mich. 182; *Stewart* v. *Clark*, 2 Swan. 9.

(*d*) *Wilson* v. *Forbes*, 2 Dev. 30; *Collins* v. *Benbury*, 3 Ired. 277; *Fagan* v. *Armistead*, 11 Ired. 433; *McManus* v. *Carmichael*, 3 Iowa 57; *Fourten* v. *Railroad Co.*, 32 Iowa 106; *Houghton* v. *Railroad Co.*, 47 Iowa 370.

(*e*) *Sherloch* v. *Bainbridge*, 41 Ind. 35; *Zug* v. *Commonwealth*, 70 Pa. St. 138. And see *Bullock* v. *Wilson*, 2 Port. 447; *Barney* v. *Keokuk*, 94 U. S. 324, and cases cited; *Walker* v. *Board*, 16 Ohio 540; *Elder* v. *Bucrus*, 6 Humph. 366.

(*f*) *People* v. *Canal Appraisers*, 33 N. Y. 461.

(*g*) *Pollard* v. *Hagan*, 3 How. 212.

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occupation, and the bank owner may thereby be cut off from any use of the stream in connection with his estate, and be deprived of benefits which he had reason to suppose he had acquired absolutely by his purchase. But if the State owns it as sovereign merely, under the eminent domain, it is to be preserved as the right of navigation is, for the common benefit and enjoyment of all the people. In New York it has been held that, on tide waters, the State may sell the bank between high and low water mark, and that the riparian owner has no remedy (*h*). Also, that the State may grant the bed of one of its fresh water navigable rivers, and turn away the river from the land of the bank owner without his being entitled to any redress (*i*). But this seems very harsh doctrine; and it is certainly one which has never been much acted upon, and is probably not generally accepted (*j*).

It is a little remarkable that in England the question, "whether the soil of lakes, like that of fresh water rivers, *prima facie* belongs to the owners of the land, or of the manors on either side, *ad medium filum aquæ*, or whether it belongs *prima facie* to the king in right of his prerogative," has never been authoritatively determined. It was referred to in a recent decision (*k*), but passed by, as not being necessarily involved in the case at bar. In Massachusetts, by the construction of the colonial laws and ordinances, extending back almost to the first settlement, it is held that great ponds belong to the State, which may grant away either the soil or the water, or both; and that the boundary of the bank proprietor is at low water mark (*l*). Under this rule, the State is at liberty to cut off by its grants all

(*h*) *Gould* v. *Railroad Co*, 6 N. Y. 522.

(*i*) *People* v. *Canal Appraisers*, 33 N. Y. 461.

(*j*) See *Bell* v. *Gough*, 23 N. J. 624; *Stevens* v. *Railroad Co.*, 34 N. J. 532; *Walker* v. *Board*, 16 Ohio 540.

(*k*) *Marshall* v. *Navigation Co.*, 3 B. & S. 732.

(*l*) *Cummings* v. *Barrett*, 10 Cush. 186; *Paine* v. *Woods*, 108 Mass. 160; *Commonwealth* v. *Vincent*, 108 Mass. 441; *Fay* v. *Aqueduct Co.*, 111 Mass. 27; *Hittinger* v. *Eames*, 121 Mass. 539. A pond of more than ten acres is considered a "great pond" under the Massachusetts colonial laws. See Boyd of Liberties, art. 16; *Commonwealth* v. *Vincent*, supra.

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water rights in the bank proprietors. The Massachusetts decisions on this subject have little or no bearing on kindred questions arising at the common law, for the reason that private grants in the colony were made subject to the colonial laws which forbade the appropriation of great ponds to individuals.

In New York the rule is established as a common law rule, that the boundary of private ownership on fresh water lakes and ponds, is the low water mark (*m*). In Vermont the rule is the same; and it is there held in reliance upon New York precedents, that the bank owner has no appurtenant right in the water which would enable him to maintain ejectment against one who should take possession, fill in and occupy the bed of the pond below the low water line in front of him (*n*). In Illinois a deed of land, in which one boundary was described as "following the course of" Lake Michigan, was held to bound the land by the line at which the water usually stands when free from disturbing causes. In the decision of this point, Justice Walker says: "The great lakes of the North present questions affecting riparian rights that are different from those arising under boundaries on the sea, upon rivers, or other running streams. They have neither appreciable tides nor currents, nor are they affected, like running streams, by rises and falls produced by a wet or dry season. Yet the rules that govern boundaries on the ocean govern this case. A grant giving the ocean or a bay as the boundary, by the common law carries it down to ordinary high water mark. The doctrine, it is believed, is well settled, that the point at which the tide usually flows is the boundary of a grant to its shore. As the tide ebbs and flows at short and regularly recurring periods to the same points, a portion of the shore is alternately sea and dry land. This, being unfit for cultivation or other private use, is held not to be the subject of private owner-

(*m*) *Wheeler* v. *Spinola*, 54 N. Y. 377; *Canal Com'rs.* v. *People*, 5 Wend. 423.

(*n*) *Austin* v. *Railroad Co.*, 45 Vt. 205. See *Fletcher* v. *Phelps*, 28 Vt. 257; *Takeway* v. *Barrett*, 46 Vt. 316.

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ship, but belongs to the public. When the adjacent owner's land is bounded by the sea or one of its bays, the line to which the water may be driven by storms, or unusually high tides, is not adopted as the boundary. On the contrary, the ordinary high water mark indicated by the usual rise of the tide is his boundary."

"This principle, however, which requires the usual high water mark as the boundary on the sea, and not the highest or the lowest mark to which it rises or recedes, applies in this case, although this body of water has no appreciable tides. Here as there, the highest point to which storms or other extraordinary disturbing causes may drive the water on the shore, should not be regarded as the point where the owner's rights terminate, nor yet should it be extended to the lowest point to which it may recede from like disturbing causes. But it should be at that line where the water usually stands, when unaffected by any disturbing cause.

The portion of the soil which is only seldom covered with water, may be valuable for cultivation or other private purposes. And the line at which it usually stands, unaffected by storms or other disturbing causes, represents the ordinary high water mark on the ocean, and the point between the highest and lowest water marks produced by the tides. Again, where is the lake as called for by the deed? A fair and reasonable construction of the language, running to the lake, and with the lake, would mean to that place where its outer edge is usually found" (*o*).

This is specific and lucid; but it may be observed of the great lakes, that the outer edge is not usually found at the same line in successive years. These bodies of water have their periodical rise and fall; and though these do not usually flood and uncover any considerable belt of land, they do so in some localities where the shore is but little elevated above the lake.

The rule, as thus declared in Illinois, is approved in Ohio, with a reservation of any opinion, however, "in

(*o*) *Seaman* v. *Smith*, 24 Ill. 521.

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regard to the right of a riparian owner to build out beyond his strict boundary line, for the purpose of affording such convenient wharves and landing places in aid of commerce, as do not obstruct navigation" (*p*). In New Hampshire the like view seems to prevail (*q*). In Wisconsin the boundary is held to be the ordinary water line, but with appurtenant water rights. Say the court: "There are *dicta* and decisions which hold, in reference to such bodies of water, the riparian proprietor takes only to the edge of the water in its ordinary condition when unaffected by winds or other disturbing causes; the proprietorship of the bed of the lake being in the State. This view commends itself to our judgment as sound and correct; and we have accordingly decided (*r*), that the water's edge is the boundary of the title of the riparian proprietor. But while the riparian proprietor only takes to the water's line, it by no means follows, nor are we willing to admit, that he can be deprived of his riparian rights without compensation. As proprietor of the adjoining land, and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place; he has the right to build piers and wharves in front of his land out to navigable waters in aid of navigation, not interfering with the public use. These are private rights incident to the ownership of the shore, which he possesses distinct from the rest of the public. All the facilities which the location of his land with reference to the lake affords, he has the right to enjoy for purposes of gain or pleasure; and they often give property thus situated its chief value. It is evident from the nature of the case, that these rights of user and exclusion are connected with the land itself, grow out of its location, and can not be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress. It seems unnecessary to add the remark,

(*p*) *Sloan* v. *Biemiller*, 34 Ohio St. 492.

(*q*) *State* v. *Gilmanton*, 9 N. H. 461; *State* v. *Franklin Falls Co.*, 49 N. H. 240, 250. See also *Bradley* v. *Rice*, 13 Me. 198; *Wood* v. *Kelly*, 30 Me. 55; *Robinson* v. *White*, 42 Me. 209; *Murray* v. *Lermon*, 1 Hawks, 56.

(*r*) *Diedrich* v. *Railway Co.*, 42 Wis. 248.

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that these riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself adjacent to the water. In other words, according to the uniform doctrine of the best authorities, the foundation of riparian rights, *ex vi termini*, is the ownership of the bank or shore. In such ownership they have their origin. They may, and do exist, though the fee in the bed of the river or lake be in the State. If the proprietor owns the bed of the stream or lake, this may possibly give him some additional right; but his riparian rights, strictly speaking, do not depend on that fact" (*s*). The same view of the riparian rights of the bank proprietor is held by the Federal Supreme Court, by which it has been declared that the right of such proprietor to erect piers, wharves, etc., only terminates at the line where the water becomes actually navigable (*t*).

In Michigan it has been decided, that the bed of those little lakes through which rivers flow, and which are in the nature of expansions of the rivers themselves, belongs to the bank proprietors, subject to the public rights therein (*u*). Judging from *dicta* in the decisions, it seems probable that the same rule would be applied to all other lakes. The practical difference between this ruling and that in Wisconsin and the Federal Supreme Court is not so great as at first blush might seem. If the bank owner is proprietor of the bed also, he is limited in his use of it only by the public right; if not proprietor of the bed, he may still make use of it limited only by the public right. The State or proprietor can not, either by regulation or sale, take from him his appurtenant rights in the water or in the navigation.

In Wisconsin it is also held that the rule of bank ownership is the same, whether the water is or is not susceptible

(*s*) Cole, J., in *Delaplaine* v. *Railway Co.*, 42 Wis. 214, 225, quoting with approval *Lyon* v. *Fishmongers' Co.*, L. R. 10 Ch. Ap. 679; S. C. 1 Ap. Cas. 683.

(*t*) *Dutton* v. *Strong*, 1 Black 23.

(*u*) *Rice* v. *Ruddiman*, 10 Mich. 125. See *Lorman* v. *Benson*, 8 Mich. 18.

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of use for navigation (*v*). Nevertheless, if accretions are formed on the shore of non-navigable ponds by slow and imperceptible degrees, or if the bed is uncovered by the gradual recession of the waters, the land thus made or recovered belongs to the proprietor of that which adjoins it. Under this ruling, if a lake or pond gradually disappears altogether, the adjoining proprietors would become owners of the whole bed, and might find their possessions increased to several times the original size. A like ruling has been made by the Federal Supreme Court (*w*). In Michigan a like rule would probably be applied, whether the lake disappeared slowly or suddenly; and there really seems no reasonable ground for distinguishing the cases, if obedience to precedent did not seem to require it. It was held in North Carolina at an early day, that a grant could not be made in front of the water line, so as to cut off the bank-owner's right to alluvion (*x*); and decisions covering the same principle have been made in Louisiana (*y*) and Arkansas (*z*). Except, therefore, as the suddenness of the change might render it difficult to adjust boundaries between adjacent proprietors of the bank, there seems to be no sufficient reason why the State should claim title. But, in truth, the difficulty in extending the lines does not depend on the change being perceptible, or the reverse; it is solved as soon as it is determined by what rule the dividing lines shall be extended from the original shore. If we apply the same rule that is applied to rivers, and extend them into the bed of the lake or pond at right angles to the general course of the shore at the point of intersection, the extension can be made as well, and as readily when the change is sudden, as when it is made by slow degrees and imperceptibly. But this is not a very important matter, as the little lakes and ponds of the

(*v*) *Boorman* v. *Sunnocks*, 42 Wis. 233.

(*w*) *Jones* v. *Johnson*, 18 How. 156. See *Banks* v. *Ogden*, 2 Wall. 57; *St. Clair* v. *Lovingston*, 23 Wall. 46.

(*x*) *Murray* v. *Lennon*, 1 Hawks. 56.

(*y*) *Municipality* v. *Cotton Press*, 18 La. An. 122.

(*z*) *Belding* v. *State*, 25 Ark. 120.

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Northwest generally recede gradually if at all; and whether under the Wisconsin rule or that of Michigan, if they disappear, their beds come at last to be private property without any grant from the State.

One important right, however, may depend upon the question whether the ownership of the bed of lakes and ponds is in the State or in the bank owners. We refer now to the right of fishing. It is generally held that the right of fishing follows the ownership of the bed; if that is in the State, the fishing is public; if not, it belongs to the bank proprietor (*a*). And this rule has been applied to small ponds or lakes owned by individuals, after very full and careful examination of the whole subject (*b*). But if the waters are navigable, and the public for that reason have rights therein, the right of fishing may well be held to be public also, irrespective of the ownership of the bed (*c*). But of course, the public can not use the shore for the convenience of fishing without consent of the owner, nor so occupy the waters immediately in front as to deprive the owner of any appurtenant rights.

The right to cut and remove ice is perhaps to be held public or individual, according to the same rules which govern the right of fishing (*d*).

THOMAS M. COOLEY.

(*a*) *Browne* v. *Kennedy*, 5 H. & J. 195; *People* v. *Platt*, 17 Johns. 195; *Carson* v. *Blaze*, 2 Binn. 475; *Beckman* v. *Kreamer*, 43 Ill. 447.

(*b*) *Cobb* v. *Davenport*, 32 N. J. 369; S. C. 33 N. J. 223.

(*c*) *State* v. *Franklin Falls Co.*, 49 N. H. 240; *Sloan* v. *Biemiller*, 34 Ohio St. 492; *Carson* v. *Blaze*, 2 Binn. 475.

(*d*) *Mill River, etc., Co.* v. *Smith*, 34 Conn. 462; *Paine* v. *Woods*, 108 Mass. 160; *Lorman* v. *Benson*, 8 Mich. 18.

A NEW ACTION.

An old man who had been badly hurt in a railroad collision, being advised to sue the company for damages, said, 'Wal, no, not for damages; I've had enough of them; but I'll just sue 'em for repairs.'—*Canadian Monthly.*

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EDITORIAL REVIEW.

Lawyers by Legislation.

An obscure little Act, consisting of a preamble and one clause, lurks at the end of the Ontario Statutes for 1881. It would have been futile in itself, if its principle had not been recognized and acted upon by the Law Society of Upper Canada. It is entitled an Act to authorize the Law Society of Ontario *(sic)* to admit a certain gentleman as a Barrister-at-Law. The first thing that strikes one is, what is the necessity for an Act. The Law Society exists for the very purpose of admitting proper persons to the profession, and the Act might therefore be at once pronounced superfluous. Let us look, however, at the preamble in order to arrive at the principle involved. In making a few remarks, he may premise them by saying, that we object not to the person named in the Act, he being unknown to the writer, but to the principle involved.

The preamble recites that the petitioner was duly articled to an attorney to serve as his clerk, and that he did serve for a period of more than three years under articles. Then transpired "circumstances over which he had not control," whereby he was forced to discontinue his studies. Latterly, however, he has been again diligently (so saith the preamble) engaged in the study of the law, and is desirous of being called to the Bar; and finally it is said to be expedient to grant his petition. The preamble bears on its face its own condemnation. It does not show that in the beginning he ever undertook a student's course or contemplated being called to the Bar, nor is yet a matriculated student of the Law Society, but that he set out simply as an articled clerk. It would have been more consistent to have recited that he had commenced and studied as a Student-at-Law, if that were the fact. The interruption of his course of preparation as an attorney furnishes no ground for special assistance in studying for the Bar. Again if he had already studied for more than three years

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under articles, surely it is as susceptible of proof to the Law Society as to the Legislature, and his time would have been duly allowed him. And if he has lately been diligently engaged in study, his course of five years must nearly have been completed—proof of which might also easily have been furnished to the Law Society, and his time would have been duly allowed him. We are aware that "circumstances over which one has no control," do not form a valid excuse to the Law Society for not complying with the rules and regulations, and may necessitate though not justify an appeal to the Legislature. For instance, inability to matriculate, non-payment of fees, inability to prove service under articles, are some of the matters which are generally fatal to a man's career at Osgoode Hall; and be they ever so much beyond his control, that does not form a sufficient excuse for allowing him a short cut to his degree. Though the preamble be proved therefore it still furnishes no valid excuse for interference. It is plainly seen that such an Act would be incomplete without some sort of a preamble to excuse it. If the preamble were untrue, the Act would be a fraud. But even admitting the truth of this preamble, it is an insufficient excuse for the legislation. The grounds of the Act are, that the Petitioner has not complied with the requirements of the Society, to which has been entrusted the education of students, but that he has nevertheless certain qualifications which do not, according to the rules of the Society, render him eligible for call for the Bar. If the Act had been anything more than a permissive piece of legislation, we should have characterized it as an impudent piece of legislative invasion of the rights of the Society and the Profession. Being permissive only, it remained with the Benchers to accept or reject the candidate, as they pleased. We are strongly of opinion that, on account of the oversight in the Act, by which a corporation or body not in existence is empowered to call the Petitioner to the Bar, the Benchers might have, and in fact should have, rejected him most promptly. We doubt very much whether his call to the Bar would be authorized even now without his

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obeying the ordinary rules and passing all the examinations. There is no such body in existence as *The Law Society of Ontario*. *The Law Society of Upper Canada* retains its ancient name, and can act under no other. A body, desirous of meeting the Legislature by a compliance with the Act, might recklessly proceed notwithstanding the defect in the Act, letting the candidate sustain his position as best he might. But a body with the cause of education at heart, with the trust of protection to the Society, the profession and the public, impressed on its conscience, would have gladly snatched at this fatal defect (as we think), in order to resent an inexcusable interference with their rules and regulations.

The Benchers have, we presume, either overlooked this misnomer or regarded it as immaterial, and have thought proper to grant permission to the candidate to present himself for examination. Let us see upon what conditions. He is to pay the usual fees for call, and in addition thereto a matriculation fee. Either an injustice has been done to the candidate, or the Benchers have been unjust to themselves. If the candidate has already matriculated, his fee has been already paid; and it would be unjust to exact it again. If he has not matriculated, and is not required to matriculate by the Act, we cannot see why, in justice, a fee should be exacted for a ceremony which is not going to take place. In either case an injustice is done to the candidate. But looking at it in the interests of the Benchers, we think it will be seen that they have been unkind to themselves. One would have supposed that the qualifications of the candidate would have been the chief source of anxiety in a body which enforces rigid adherence to its rules regarding admission and call in ordinary cases. The receipt of an extra fee from a candidate is not a proper substitute for the application of the preliminary test of the matriculation examination wisely prescribed by the rules. Is this action just to numbers of students who are struggling with adverse circumstances? Is it just to those who patiently and wearily labour through the routine of drudgery and hard study to arrive at their degrees? Is it just to

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the hundreds of young men, well and regularly qualified, who are fighting their way against the overwhelming odds of a largely stocked profession and a host of unprofessional conveyancers? Will the cause of legal education be thus advanced? Will the honour of the profession be brightened? While the standard of education is from year to year being raised, the profession may congratulate themselves that their Trustees have, in consideration of a defective Act of the Legislature and a supplementary fee, granted permission to a candidate to present himself for examination and call to the Bar, whose other qualifications did not render him eligible.

There is one grain of satisfaction left. Though the Legislature and the Law Society may by their combined efforts make a man a barrister, Nature alone can make him a lawyer.

Female Lawyers.

A Woman Master in Chancery. — We are pleased to announce that Mrs. Schuchardt, daughter of Ex-Governor Dougherty, the woman Master in Chancery, of Union County, has at last won her case. Judge Harker, of the Circuit Court, paid her the compliment of saying that she was the most competent Master in his circuit, but held that as she was a woman she could not legally hold the office. She appealed to the Appellate Court, composed of Judges Casey, Baker and Wall, and they, without giving any reason, or writing any opinion, affirmed the judgment of Judge Harker. Mrs. Schuchardt again appealed and took the case to the Supreme Court, and on Tuesday last that Court, by Judge Scholfield, reversed the judgment of the two Courts below, and held that a woman could hold the office of Master in Chancery. One by one, the old rules of law which prevented woman from standing side by side upon an equality with man, are being removed by the liberal enactments of the law-making power and the construction of our Courts.—*Chicago Legal News.*

It is refreshing to notice that it is not thought worth while to change the title of the office on account of its

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incumbent's sex. It is not an uncommon thing for some of our ultra-learned friends, not satisfied with the comprehensive term *heir-at-law*, to be very particular about describing the daughter of an intestate as an *heiress-at-law*, as if the relationship between child and deceased parent were influenced by sex.

The progress of events may raise the question here, as well as elsewhere, as to the right of a woman to enter the lists. The capability aside, there might be a little difficulty about the costume, which does not trouble our neighbours. We have one public office now, thanks to advanced legislation, which might be appropriately filled by a woman, but the opportunity for working the change has for the moment passed. An Act might easily be passed at the next session of the Ontario Legislature, under the guise of "Amendments to the law," or some such comprehensive and inexpressive title, which would prevent the attraction of much attention to it at the time, and might enact that hereafter the office of Guardian *ad litem* of all Infants shall be filled by an experienced woman in the place and stead of the present official guardian, a male.

The Entering Clerk's Room.

During the long vacation, means should be taken to purify and ventilate the Entering Clerk's room at Osgoode Hall. The odour that clings to it is not kindred to any of the numerous perfumes that greet the nose in the streets of Toronto, and its cause cannot therefore be authoritatively stated. Due regard should be paid to the health of the gentleman who has to sit there from day to day; and we urge upon the Department having jurisdiction, not to condemn him to pass another year in such an odorous and ill-ventilated atmosphere.

Streams and Rivers.

We print this month an article from the *Central Law Journal*, which, on account of the interest taken in *McLaren* v. *Caldwell*, will, we are sure, be widely read. The name of the eminent and learned writer of the article is a sufficient guarantee of its worth.

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BOOK REVIEWS.

Argument of the Hon. Wm. Macdougall, C.B., in the Mercer Escheat case, before the Supreme Court of Canada. Reported by Andrew Holland, Reporter for the Senate, 1881.

We have in a compact pamphlet of twenty-nine pages Mr. Macdougall's argument *in extenso*. A speech when printed, or an essay when read aloud, each loses many of its characteristics and chief elements of value. An essay is to be read deliberately, and patiently digested. If listened to as a reading, the various phases of thought pass before the mind's eye like a panorama, and, for a thorough appreciation of it, it must be recurred to again for deliberate reading. And *per contra* a speech or argument, which is emphasized and infused with additional meaning by action and intonation of voice, loses both of these when it appears in print. Many passages may quite lose their meaning, and, unless the reader is well acquainted with the speaker's style, the whole reads, to a certain extent, tamely. We are almost universally accustomed to look through an argument merely for the purpose of gleaning therefrom the points made. And, in our reported cases, little more is to be found than notes of the heads of argument. (We do not now refer to those cases in which "the facts are fully stated in the judgment.") But in this pamphlet we have the argument *in extenso*, reported after the manner of a Parliamentary speech, and any one conversant with Mr. Macdougall's incisive style will, in imagination, hear the expression which would be thrown into such a period as the following:—"The local officials, with a voracity that was revolting, seized it for the purpose of gaining credit to themselves with their partizans, and, ignoring the moral, and as I contend, the rightful claims of the admitted son and four grand children of this deceased person, appropriated their patrimony to the use of abandoned women, to the erection of an asylum, a reformatory for prostitutes—and, adding insult to injury, with cruel

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sarcasm, they give this asylum the name of ANDREW MERCER!" This, however, is not argument, and such passages, which do not by any means enhance the value of the address, are few. It would be impossible to follow the learned gentleman through the whole of his argument. His position is this:—The hereditary revenues of the Crown, prior to 1840, were under the direct management and disposition of the Crown through its Colonial representatives. At the union of the two Provinces of Canada in 1840, these hereditary revenues and the prerogative rights were retained by the Crown, subject to certain provisions. That by the B. N. A. Act jurisdiction over every possible subject of legislation is assigned to the Dominion Parliament, except those particular matters which are assigned to the Provincial Legislatures. The Lieutenant-Governor is not the Sovereign's representative, but is one of the colonial administrative staff. No portion of the Royal prerogative has been ceded to him, and he exercises none by virtue of his office, since he represents the Governor-General only. And *Lenoir* v. *Ritchie* is cited in support. The point is then made that the "sale and management" of the public lands only are conceded to the *Provincial Legislatures* by the B. N. A. Act, while the revenues, still undisposed of, remain to the Crown. It is thus seen that it is the *Legislature* that deals with the lands, if the Province has jurisdiction at all, and not the Lieutenant-Governor, as representing the Crown. An escheat does not come within the meaning of the word "Royalties," as used in the B. N. A. Act. The Crown is *ultimus hæres* on failure of heirs, and does not claim a reversion properly so called upon failure of any one entitled to the estate created by the original grant. The argument is well worth reading on account of the collection of interesting matter which throws some light upon our complex constitution. Many ancient authorities have been consulted, and questions of historical interest are dealt with, as well as legal points. Of the value of the argument in the latter aspect, it would be impossible and improper to speak while the case is *sub judice*.

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REVIEW OF EXCHANGES.

American Law Register.—June, 1881.

Contempt of Court, by CHARLES CHAUNCEY, is continued. The difference between the English system of Courts and those in the United States of America is pointed out, and cases are cited showing how the latter Courts have modified the English doctrine as to the exclusive right of Superior Courts over contempts.

American Law Review.—June, 1881.

Conversion by Purchase, by NATHAN NEWMARK. This essay may be divided into two heads. The first includes all those classes of cases where the converter has obtained the possession of the goods without acquiring any title thereto. And the second includes those where the fraudulent dealer has a defeasible title, which his purchaser for value without notice takes shorn by the law of all elements of defeasibility. As to the first class, "the entire controversy in doubtful cases revolves about the title; for, as the Napoleonic Code phrases it, 'the sale of another's thing is null.'" This aphorism sums up the whole discussion. As to the second class, 'The real problem in the domain of sales is in deciding whether there is a subsisting condition precedent, or whether the title has absolutely passed. This is a question of fact, governed by the intention of the parties." Where the delivery of the goods is upon condition subsequent, the title passes subject to defeat upon non-performance of the condition. A defeasible title is thus acquired by the vendee And if the option of rescinding the agreement be not exercised before re-sale, the purchaser for value without notice from the vendee upon condition gains a good title. But where it is provided that the title shall remain in the original vendor until the performance of some condition, the vendee having no title can transmit none. Voidable titles manifestly fall within the same rules as those governing defeasible titles. "We take the rule to be well settled, that where there is a contract of sale and an actual delivery pursuant to it, a title to the property passes, but voidable and defeasible, as between the vendor and vendee, if obtained by false and frandulent representations. The vendor, therefore, can reclaim his property as against the vendee, or any other person standing on his title; but not against a *bona fide* purchaser without notice of the fraud. The ground of exception in favour of the latter is, that he purchased of one having a possession under a contract of sale, and with a title to the property, though defeasible and voidable as between the parties to the original sale and purchase, on the ground of fraud; but as the second purchaser takes without fraud, and without notice of the fraud of the first purchaser, he takes a title freed from the taint of fraud." Within the second class falls *Walker* v. *Hyman*, 1 App. R. 345.

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Street Railways and their Relation to Highways, by W. H. WHITTAKER. A retrospect of the cases in which the question has arisen and been decided, whether or not street railways are such an additional burden upon the soil of the streets as to entitle adjoining land-owners to compensation. In the absence of Statutes governing the subject, the cases have been very uniform in holding that compensation is not the rule. In Ohio, however, a contrary doctrine prevailed, till a statute was passed touching the question.

Ibid.—July, 1881.

Liability of Officers Acting in a Judicial Capacity—I.—By ARTHUR BIDDLE. The subject is thus treated:—All officers to whose action are attached discretionary powers are divided into two classes, *judicial* and *quasi judicial.* Judicial officers are actual judges of Courts; quasi-judicial, those who officially are called upon to exercise discretion or judgment. Judicial officers are again divided into Judges of Courts of record, and Judges of Courts not of record. The rule of the liability of Judges of record may be thus stated: *A Judge of a Court of record is not liable at Common Law for any act he does as Judge, while acting within his jurisdiction.* The reason of this is peculiar. The Common Law never suffered anything to be averred against the record. This served to protect the Judge as well as to prevent litigation, since no one could attack the Judge for what he did within his jurisdiction without attacking the record as well. A record may, of course, be attacked for fraud; but this is the fraud of the parties, whereby the Judge has been deceived. A remarkable instance of the exemption from liability of a Judge is noted, where a Judge rased the record and inserted *billa vera*, when there had been found *ignoramus*, and it was held no action would lie. The additional reason is given for this exemption from liability, that the Judges feel that they can act independently, and without fear of being brought to account for anything done in the administration of justice, and that they may retain all that dignity which is so essential to Courts of justice. There are matters of expediency, we may say of absolute necessity; but *quære* whether they are the Common Law foundation of the exemption. The denial of the right to dispute the record, while furnishing a certain inflexible rule, also furnishes, to some extent, a test of whether a Judge has been acting *judicially* in his Court, or in matters in which anyone else could act, and for the performance of which the commission of a Judge is not essential. The distinction drawn between judicial and ministerial acts, it is said, has no application to Judges of Superior Courts of record, since all acts of a Judge of record which he does as such are, in reality, judicial. A case is cited, *In re Coles*, South. Law Rev. April, 1880, where, the Judges in Virginia being empowered to select jurors, Judge Coles never selected any negroes to sit. If a Judge refused to put negroes on the juries, merely on account of their race, he was liable to indictment. And Judge Coles was held liable. The learned writer disputes the legality of the decision. "Jurisdiction" is defined. "*The power to hear and determine is jurisdiction, or coram judice.*" "Where the judgment he pronounces is erroneous or voidable, there he has jurisdiction; where absolutely void, there he has

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no jurisdiction." A record may be attacked for want of jurisdiction of the Court making it; but as the matter was *coram non judice*, it was no record at all. As to Judges of Courts not of record—Judges of these Courts are only excused when their act is an honest judicial error of judgment. To render a Judge of an inferior Court liable for acting without his jurisdiction, it must reasonably appear that the want of jurisdiction was brought before his notice, or that he ought to know the fact. "In a Court of general jurisdiction nothing shall be intended to be outside of its jurisdiction, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged."

Liability of Trust Estates on Contracts made for their Benefit, by LOUIS D. BRANDEIS. This paper treats of the liability of estates for debts contracted by their trustees. In the words of the learned writer, "Does a contract entered into with a trustee for the benefit of the trust estate subject the same to any liability, or is the sole remedy of the creditor a personal action against the trustee?" "In the ordinary case of a contract by a trustee or guardian for the benefit of the estate, when he becomes personally liable on the same, no lien arises against the estate as a concurrent remedy. If the trustee or guardian is solvent, he, and he alone, must be proceeded against. The learned writer then proceeds to show that, where a trustee is insolvent and the estate has had the benefit of the contract, an equity arises in favour of the creditor. The authorities are said to be in conflict as to whether the creditor is merely subrogated to the right of the trustee, or has an independent, contingent equity against the estate. The opinion is expressed that the adoption of the theory of subrogation would be a repudiation of the whole doctrine, and that the right of the creditor is not dependent upon the state of the trustee's account, or his right to recover from the estate the expense which he has incurred. Finally, as the creditor acquires no right to proceed against the estate before the trustee becomes insolvent, it is said that the Statute of Limitations, if it applies at all, does not begin to run before the insolvency. The cases cited are almost exclusively American, the doctrine having been repudiated in England at the beginning of this century, and having since received no attention there.

Canada Law Journal.—1st June, 1881.

Dominion Control over Provincial Legislation, by A. H. F. LEFROY, concluded in the following number. Reports, correspondence, and some decisions upon those bills which, from their nature or contents, the Governor-General in Council might properly, or should, disallow, are cited.

Ibid.—1st July, 1881.

Mortgages on unplanted Crops, by J. A. B. It is pointed out that a thing not *in esse* was not the subject of a grant at Common Law; *nemo dat quod non habet*. Where, however, the thing granted had a potential existence the grant was good. In equity it was otherwise. And the

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principles of law and equity now being interwoven—equity prevailing—the old common law rule has faded away. Growing crops are not within the English Bills of Sale Act, which refers to "personal chattels;" and these are defined by the Act to be such chattels as are capable of a present complete delivery. This point, with reference to the Ontario Chattel Mortgage Act, has been productive of a difference of opinion in the Court of Queen's Bench. In *Hamilton* v. *Harrison*, 1 C. L. T. Occ. N. 424, the majority of the Court thought that growing crops were not within the Act. The Statute requires one of two things, either of which will suffice, viz., an immediate delivery and an actual and continued change of possession of the chattels, or a registered mortgage or bill of sale. Following the reasoning of cases cited in two articles in this journal (*a*), inasmuch as growing crops are not capable of immediate delivery without change in the occupation of the land itself, one of the alternatives of the Act cannot be complied with; therefore, neither is the other required; and so growing crops are not within the Act. From this Mr. Justice Armour dissents. As to the passing of the property by such a document, see *Laing* v. *Ontario L. and S. Co.*, 1 C. L. T. Occ. N. 423.

Central Law Journal.—27th May, 1881.

Joinder of Co-trustees in Receipt of Money, by JAMES A. SEDDON. The result of a review of some English and American authorities is embodied in the following passage:—"However formal and ministerial the Act may seem, it can safely be affirmed that where money is due to a trust estate, and there are several trustees, the general principle prevails, that there is no such thing recognized in law as a sole acting trustee, that they form but one body and must join in the receipt in order to give to the debtor a good and valid discharge and receipt. It is not intended, however, that each should sign the receipt, or even that there should be any writing at all—as a matter of fact it is impossible to pay the money to more than one of the trustees. If in any manner they concur in the act or ratify it, that will be a sufficient joinder to discharge the debtor."

Ibid.—3rd June, 1881.

Proof of Handwriting, by SHELDON G. KELLOGG, reviews some authorities, English and American, upon the subject.

Conflict of Laws in Relation to Marriages, by C. G. TIEDEMAN. It is said upon authority that, "In this country [the United States] it has been generally held, that the intervention of a minister or magistrate was unnecessary unless a legislative enactment required it, and expressly declared any other form of marriage null and void." The law of Christendom having been changed in different countries by legislative enactment, a conflict arose. A marriage, valid where it is celebrated, is generally held valid everywhere, as regards both the ceremony and the personal capacity of the parties; and Bishop is cited as authority for this. But the learned

(*a*) *Ante*, pp. 71 and 137.

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writer points out a variety of conflicting authority on the question of contractual capacity, the result of which is, that the jurists of Continental Europe and the English Courts favour the construction of capacity of parties by the *lex domicilii*, while the Americans are in favour of subjecting the contract to the *lex loci contractus*. The conflict is said to arise from the "distinction drawn between personal and real statutes." "Under the civil law, personal statutes (statute here meaning anything which has the force of law), are those which attach to, and establish, the status of the individual, while real statutes define his relation to things, *i. e.*, every species of property." The difficulty is again thus shown:—"Mr. Bishop says, 'Where the foreign marriage is not only forbidden by the law of the domicil, but by the law of nature also, as where, for example, it is incestuous by natural law, it is treated as void, both by the courts of the domicil of the party, and in those of all other countries.' But what is the law of nature? Does it not vary according to the moral and religious ideas of each people? * * * All the marital prohibitions have, or are supposed to have, their foundation in nature, and vary according to the nature and condition of the people." The article concludes by stating that in the German Empire and some other of the European countries the marriage is purely a civil contract, the ceremony being performed by a civil officer. The ceremony has also been regulated by legislative enactments in some of the States of the Union. Since the publication of this article an important case has appeared in the *Chicago Legal News* of 6th July, viz., *Roth* v. *Ehman*, at p. 353. The theory of the "personal statute" has been rejected, and it is held that authority and reason lie on the side of the *lex domicilii* as governing the capacity to contract. Many other questions arise in this remarkable case.

Ibid.—*10th June*, 1881.

Exemplary Damages, by WM. L. MURFREE, SR., continued in the two following numbers. The views of Mr. Sedgewick have been adopted in most of the States, and therefore the learned writer accepts as law his doctrine, that damages beyond compensation are allowable; and his investigation proceeds upon this ground. A difficulty, more theoretical than practical, appears upon the threshold, and becomes apparent by the collation of passages taken from the first and third parts of the paper. Thus, quoting from Mr. Justice Campbell, in *Philadelphia, etc., R. Co.* v. *Quigley*, 21 How. 202, it appears that "whenever the injury complained of has been inflicted maliciously or wantonly, * * the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person." The learned writer then says, "The word 'limited' implies that the jury shall go to the limit of compensation, and the Court declare that they may go further." "Damages should be give in one sum, not so much for compensation and so much for example or punishment." From which we may deduce that in those classes of cases in which exemplary, vindictive or punitive damages may be recovered, a jury, being directed to assess damages in one sum, has no guide as to what simple compensation is—what is the limit to which they shall go, and beyond

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which they may go. Nor are they likely to be enlightened by the deduction from the "confusion of language in the books on this subject; for all damages in excess of the strict, gross material loss in actual pecuniary value, suffered by the plaintiff, are often denominated exemplary, when in point of fact they are merely, and sometimes barely, compensation." This confusion may justify Mr. Greenleaf's conclusion that "there is no warrant in the law, either upon principle or authority, to award to any plaintiff damages in excess of compensation for the injuries set forth in his complaint, and sustained by his testimony." Indeed, the learned writer, while adopting Mr. Sedgewick's dissenting doctrine, well-nigh demolishes it. He says, speaking of breach of promise cases: "Loss of time, the wasting away of plaintiff's youth and bloom, the hope deferred, are all serious and palpable wrongs, and for them she is entitled to compensation * * If they are to be considered at all, and anything is to be awarded to the plaintiff on their account, it is because she ought to have it, and whatever she ought to have, constitutes compensatory, and not exemplary, damages." The theory is then reduced to this:—The jury are the sole judges of the amount of damages. They must always assess them in one sum, without defining what is solely compensatory. Yet they must go to the limit of compensation, which they are not allowed to define, and may go further and give exemplary damages. These so-called exemplary damages are in many cases barely compensation. What the jury give, upon a consideration of allowed and submitted facts, the plaintiff is entitled to; and being entitled thereto, they are compensation in fact, and not exemplary damages. Thus it appears that the pursuit of the theory is less fruitful of results than an examination of actual practical results. It is pointed out that where a parent sues for the seduction of his daughter, exemplary damages may be given "to avenge the plaintiff and punish the defendant." But where a literal master sues, the defendant escapes punishment and pays for the actual loss of services only. In actions for the abduction of infant children, the child may recover exemplary damages, but the father only compensation for loss of services. In actions for injuries to the person, the law makes allowance only for what is done in the heat of passion, caused by the improper conduct of the other party; but words, though not justifying an assault, may be proved in mitigation of damages. The civil wrong is entirely independent of the public offence, though in some of the States of the Union it is held that where the defendant has been punished criminally, it would be punishing him twice to award vindictive damages in a civil action. In actions of negligence, "the weight of authority is evidently in favour of the proposition that a principal is liable for exemplary damages for the wrongful act or negligence of his agent, done while in the due course of his employment as such agent; and this without reference to the fact that the principal either authorized the act before, or ratified it after, its commission." "Exemplary damages, it may therefore be concluded, may, in proper cases, be given by a jury for injuries or wrongs, caused by gross negligence, either of the defendant himself or of his servant or agent, acting in due course of his employment." "Simple negligence, ordinary negligence, slight negligence, will not suffice to justify a verdict for exemplary damages." Gross negligence is

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then shown to be wilful or preconceived The last instalment of the paper gives instances of exemplary damages for acts of injury to reputation and property accompanied by malice. American cases are almost exclusively cited.

Ibid.—*17th June*, 1881.

Implied Trusts, by FONTAINE T. FOX, JR. Cites cases illustrative of those expressions from which trusts have been implied.

Ibid.—*15th July*, 1881.

Dower under Legislation, GIDEON D. BANTZ. Washburn is cited as authority for the proposition that Dower is not derived from, nor is it dependent on any contract. And Park is cited for the authority that it is by silent operation of law, one of the incidents of the *status* of marriage as distinguished from the contract of marriage. The question is nevertheless fairly arguable. It is true there is no subsisting contract between husband and wife, the marriage contract having resulted in a *status*. But the right to Dower, being one of the incidents of the status and accompanying it as a matter of course, is a direct effect or result of the contract unless provided against. It may be said that if the contracting parties do not provide against it they intend it as one of the results of their contract. It is not such an incident of the *status* that it may not be contracted against by marriage settlement. *Quære*, then, whether it does not depend altogether upon contract. It may, at least, be said to "arise out of contract" within the meaning of the R. S. O. cap. 116, sec. 7. American authorities are then cited as to the rights of the Legislatures to modify or control existing rights.

The learned writer quotes from *Baron Parke's work on Dower*, which we now hear of for the first time; but a copy of which, or a reference to, or history of, which we have been unable to find after diligent search.

Criminal Law Magazine.—*May*, 1881.

Personal Identity. ANONYMOUS. This very interesting article cites some extraordinary historical cases of resemblance of individuals to each other. The fallibility of human testimony in cases of the personal identity of living persons having been thus demonstrated, it is asked if it be not more difficult to recognize a piece of bleeding or mortifying flesh, or a parcel of bones, as a fragment of a missing human identity. Instances are given where prisoners have been convicted wrongly, without medico-legal evidence to identify the *corpus delicti;* while on the other hand a conviction has rightly been obtained almost solely upon medico-legal evidence. Personal identity, in the case of a dead body, may be established, 1st, by recognition of the features. Failing this, 2nd, by reference to marks upon the body, to clothing, or to objects or things found near the remains; and 3rd, when all these are wanting, by careful medical or anatomical examination of the remains themselves. It is in this third case that medico-legal experience avails.

Self-Criminating Evidence, by DENNIS S. WADE. *Nemo tenetur seipsum* is the text of this article. The following propositions are enunciated:—I. The privilege is personal and belongs to the witness and

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not to the party calling him. No one else can assert the privilege if the witness do not. If the crime is barred by the Statute of Limitations the privilege is gone, because the danger is gone. So, if the witness has been pardoned. II. The witness is not the sole judge as to when he may assert his privilege. He may have motives in concealing evidence, or may refuse to answer through ignorance or unfounded fear. "In relation to the privilege of witnesses it is necessary to avoid these two extremes: 1. That of *permitting* the witness to protect himself by his privilege by refusing to answer questions which cannot, from the nature of the answers sought, criminate him. 2. That of *compelling* him to answer when, from the nature of the questions, the answers would inevitably criminate him. In the first, the court must be the judge and compel the answer. In the second, the witness is the sole judge, and may answer or refuse, as he sees proper." III. A witness may waive his privilege and voluntarily criminate himself, or if, understanding his privilege, he discloses part of a transaction he may be required to state fully all he knows of the matter, though his answers criminate him. IV. It is often competent to prove other crimes in order to show the intent with which the crime charged was committed.

Irish Law Times.—23rd April, 1881.

Liability for Loss of Goods Transported beyond Carrier's Route. The distinction pointed out by Mr. Lawson between the English and American doctrines is noted. The English doctrine is that "where a carrier receives goods directed to a place beyond his line, he, by the very act of acceptance, engages to deliver it at its destination, wherever that may be; while in the majority of the States the acceptance of the goods, so directed, is considered to imply nothing more than an agreement on the part of the carrier to transport them to a connecting line in order to complete the carriage." Recent English and American cases are then reviewed.

Ibid.—7th May, 1881.

Words of Relationship in Wills. Cases are cited to show that "cousins" includes "first cousins" only. "Second cousins" without explanatory context includes only second cousins strictly so called, and not persons standing within the same degree. "Most deserving male cousin" means worthy in point of succession, *i.e.* eldest. Nephews and nieces are nephews and nieces by consanguinity and not by affinity, except where there are no such relatives by consanguinity. Cases illustrated of the meanings of "family" and "children" are then given.

Ibid.—14th May, 1881.

Remoteness of Consequential Damage. Continued and concluded in the six following numbers. The result of a deal of industry and a facile pen. The learned writer examines a great number of English, Irish and American cases, many of which are not cited in Mayne. An occasional reference is made to Mr. R. Vashon Rogers' *Law of the Road*, and several Canadian cases are cited.

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Ibid.—*2nd July*, 1881.

Infringement by third persons of Employers' right to services of Employees. I. "As general principles," says the learned writer, "it may be stated that an action lies by a master against a person who deprives him of the services of his servant; and that, where there is a valid contract of service, or an actual subsisting service in fact to the knowledge of the defendant, and an actual loss of service by the act of the defendant, an action will lie for enticing away a servant during the stipulated period of service, or harbouring such servant, after quitting the master, during such period." And authorities are cited in support. The case of *Bowen* v. *Hall*, L. R. 6 Q. B. D. 333, is referred to. The learned writer also refers to the Canadian case of *Hewitt* v. *Ontario Copper Lightning Rod Co.*, 44 U. C. R. 287, and Scotch and American cases in which the right of action is affirmed.

Ibid.—*9th July*, 1881.

Infringement by third persons of Employers' right to services of Employees. II. "Though a contract cannot impose the burdens of an *obligation* on a third person, can it impose a duty on him extraneous to the obligation not to interfere with its due performance?" The question has been answered in the affirmative. The dissenting judgment of Coleridge, J., in *Lumley* v. *Guy*, 2 E. & B. 224, which was followed by *Bowen* v. *Hall*, is referred to. His Lordship's view was that, "first, merely to induce or procure a free contracting party to break his covenant, whether done maliciously or not, to the damage of another * * * is not actionable; second, that the law with regard to seducti n of servants from their master's employ, in breach of their contract, is an exception, the origin of which is known, and that that exception does not reach the case of a theatrical performer." *Lumley* v *Guy* depended on the proposition adduced from the leading case of *Ashby* v. *White*, "that (i) wherever a man does an act which in law and in fact is a wrongful act, and (ii) such an act as may, as a natural and probable consequence of it, produce injury to another, and (iii) which in the particular case does produce such an injury, an action on the case will lie."

Professional Compensation. A complaint is made that the present tariff of fees is too low; that the Judges are well disposed but ill informed, and do not err on the side of liberality. Certainly persons, conversant with the details of that branch of the Profession, should be consulted as to the tariff. In our own country, where the two branches are so mixed up, the Judges can draw upon their knowledge gained as Attorneys and Solicitors for the purpose of framing tariffs. The learned Editor thinks that a generous recompense would not have the effect of making Solicitors grasping, but rather the contrary. By giving the Solicitors a voice in the matter, such a result is not feared as that attained, probably, in the Western States, viz.: "To waking up in the night and thinking about your case, $5."

Law Journal.—*7th May*, 1881.

The Status of Legitimacy. Three ideas play a prominent part in considering the rights and disabilities of illegitimate children. These are:

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1. Intention, or designation. 2. Status. 3. Public policy, as founded upon certain notions of morality." The ancient authorities are opposed to the validity of a gift to an illegitimate child not yet in being. An illegitimate child *en vetre sa mère* could take, if described by reference to the mother alone; but a reference to the father was fatal. Subsequently it was held, in *Occleston* v. *Fullalove*, 43 L. J. Ch. 297, that a gift to an unborn illegitimate child was good, though made with express reference to the putative father. The status of the domicile has been adopted by the law of England for the purpose of succession under the Statute of Distributions; though otherwise as to realty.

Ibid.—14*th May*, 1881.

Procuring a Breach of Contract. In dealing with two cases that have defined the actionable right in the premises the dissentient views of Mr. Justice Coleridge and Lord Coleridge are referred to. The latter is thus quoted:—"It is, I believe, admitted that if a man maliciously endeavours to persuade another to break a contract, but fails in his endeavour, the malicious motive is not in itself a cause of action. It is, I believe, also admitted, except by Sir William Erle—whom I think no one has ever followed on this point—that if a man endeavours to persuade another to break his contract, and succeeds in his endeavour; yet, if he does this without what the law calls malice, the damage which results, however great, is not in itself a cause of action—I mean, of course, a cause of action against him. But if the damage, which is not in itself actionable, be joined to a motive which is not in itself actionable the two together form a cause of action. This seems a strange conclusion." Editorially it is answered, "With all respect, if this conclusion is strange, so is the whole theory of the action on the case. *Damnum sine injuriâ* is not actionable; *injuria sine damno* is not actionable: but, if both combine, a right of action arises."

Ibid.—21*st May*, 1881.

Disclaimer by Yearly Tenant. Instances are given of words used which have been held to amount to disclaimers by tenants; and a case is discussed, in which a letter, written by defendant's solicitors in answer to a request for the increase in rent, denying the right of the landlord to raise the rent, was held to amount to a disclaimer of the landlord's title.

Ibid.—4*th June*, 1881.

Constructive Conversion. The doctrine of Equitable Conversion is stated in Sir Thomas Sewell's words, in *Fletcher* v. *Ashburner*, 1 Bro. C. C. 497. It is thought that the doctrine has been carried further than was at first contemplated; and a case is discussed, in which the modern doctrine produces great complexity. The key to the true doctrine is well expressed by Bovill, C.J., in *Re De Lancey*, L. R. 5 Ex. 108, as follows:—"Equity does not alter the character of the property, but the nature of the title to it."

Ibid.—11*th June*, 1881.

Transfers of Bills of Sale. A case of *Horne* v. *Hughes*, in the June number of the *Law Journal Reports*, is discussed, in which it was

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held that, where part of a loan secured by a registered bill of sale was paid off, and the bill was transferred to a third person who paid off the transferor and made a fresh advance to the original grantor, so as to bring up the loan to the face of the bill of sale, such transfer did not require registration. It is remarkable that the grantor joined in the transfer to the plaintiff under which new advances were made. The English Act requires a bill of sale to be registered, but does not require registration of a transfer. The effect of the decision is not to be measured by the mere proposition that a transfer does not require registration. Its effect is, that such a bill of sale may be kept upon the register as a shifting security for various sums at various times, by getting transfers made in which the grantor may join with impunity. Such a state of facts as the following is suggested by the learned writer. "The Act is directed against fraud; and it would not be difficult to suggest cases in which fraud would be facilitated by the decision. Some one, let it be supposed, is asked to lend money to the grantor. The proposed lender finds a bill of sale for 500*l.* registered against the proposing borrower's name. The money is lent; but it turns out that, by means of a transfer, there is still a bill of sale for 500*l.*" And, we might add, the transfer might take place as well after the sale as before it. In *Wale* v. *Commissioners, etc.* 48 L. J., Q. B. 574, a transfer of a mortgage of land with a fresh advance was held to be partly a transfer and partly a fresh advance, for the purposes of the Stamp Acts. By our own Chattel Mortgage Act, a bill of sale or mortgage "shall" be registered, but an assignment "may" be registered, except in case of renewal. In the latter case registration of assignments is compulsory at the time of renewal. The 11th section of the Act requires that, if the affidavit upon renewal be made by an assignee, the mesne assignments constituting his title shall be filed at or before the time of the renewal. Still, the danger pointed out by the learned writer, as above quoted, may exist at any time during the year before renewal.

Ibid.—*25th June*, 1881.

Charter-Party Clauses. The meanings of the phrases, "so near thereto as she may safely get," and "lay and discharge afloat," are discussed in the light of recent cases.

Damages for a forcible entry. A plaintiff who was proceeding to have the defendant declared wrongfully in possession of a house, finding the process too slow, put him out forcibly. It was held by Mr. Justice Fry that the defendant was not entitled to damages. "The result," says the learned Judge, "seems to be that, inasmuch as his possession was unlawful, the defendant can recover no damages for the wrongful entry." *Newton* v. *Harland*, 1 M. & G. 644, was discussed. As to this, it is said, "If *Newton* v. *Harland*—as held by the majority in Banc—is good law, a person who forcibly enters and turns out a tenant holding over, is liable for all the natural consequences of his act. In *Harvey* v. *Bridges*, 14 M. & W. 437, Baron Parke says, "he is not liable to the other party," in speaking of *Newton* v. *Harland*. And this seems to be the opinion of Mr. Leith. See Bl. Com, by Leith & Smith, 175, citing Canadian and English cases.

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Law Society of Upper Canada.

EASTER TERM, 44TH VICTORIÆ.

During this Term the following gentlemen were called to the degree of Barrister-at-Law :—

George Bell, with honours; John O'Meara, Charles Henry Connor, George Macdonald, John Birnie, jr, Charles Egerton Macdonald, Howard Jennings Duncan, Stewart Campbell Johnstone, Lendrum McMeans, William Boston Towers, Francis Edwin Galbraith, Charles Wright, John Kelley Dowley, Charles Herbert Allen, Charles Elwin Radcliffe, James Leland Darling, John Clarke Eccles, George William Baker, Hedley Vicars Knight, George Ritchie. The names are placed in the order of merit.

And the following gentlemen were admitted into the Society as Students-at-Law, namely :—

GRADUATES OF UNIVERSITIES.

Adam Carruthers, B.A.; James Alexander Hutchin, B.A.; George Frederick Lawson, B.A.

MATRICULANTS OF UNIVERSITIES.

John L Peters, Morris Johnson Fletcher, Francis Cockburn Powell: Toronto University.

JUNIOR CLASS.

Herbert Gordon Macbeth, Alson Alexander Fisher, William Edwin Sheridan Knowles, Thomas Hobson, Robert Alexander Dickson, Peter D. Cunningham, Alexander McLean, William Thomas McMullen, Miron Ardon Evatts, William John McWhinney, Richard Armstrong, Alexander Duncan McLaren, Edward Corrigan Emery, John Craine, Joseph McKenzie Rogers, W. Arthur Ernest Kennedy, Given Herbert Stephenson, Arthur W. Wilkin, Walter George Fisher.

The examination of William Lesslie Beall was allowed him as an Articled Clerk.

INTERMEDIATE EXAMINATIONS.

The following changes in the Curriculum will take effect at the examinations immediately before Hilary Term, 1882 :

FIRST INTERMEDIATE.

Williams on Real Property, Smith's Manual of Common Law, Smith's Manual of Equity, Act respecting the Court of Chancery, Anson on Con-

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tracts, The Canadian Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, Revised Statutes of Ontario and amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone (second edition), Greenwood on the Practice of Conveyancing (Chapters on Agreements, Sales, Purchases, Leases, Mortgages and Wills), Snell's Equity, Brown's Common Law, Williams on Personal Property, O'Sullivan's Manual of Government in Canada, The Ontario Judicature Act, Chapters 95, 107 and 130 of the Revised Statutes of Ontario.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Pollock on Contracts, Story's Equity Jurisprudence, Theobald on Wills, Harris' Principles of Criminal Law, and Books III. and IV. of Brown's Common Law, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, The Statute Law and the Pleadings and Practice of the Courts.

FOR CERTIFICATE OF FITNESS.

Taylor on Titles, Hawkins on Wills, Taylor's Equity Jurisprudence, Smith's Mercantile Law, Benjamin on Sales, Smith on Contracts, The Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Primary Examination for Students-at-Law and Articled Clerks will begin on the 2nd Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

The Second Intermediate Examination, on the 3rd Tuesday, except in Trinity Term.

The First Intermediate, on the 3rd Thursday, except in Trinity Term.

The Attorneys' Examination, on the Wednesday, and the Barristers' Examination, on the Thursday, before each of the said Terms.

FEES.

Notice Fees	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Attorney's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fees	1 00
Fee in Special Cases additional to the above	200 00

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RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATION FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other Candidates for admission as Articled Clerks or Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

ARTICLED CLERKS.

1881.

Ovid, Fasti, B. I., vv. 1-300: or
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

STUDENTS-AT-LAW.

1881.

CLASSICS.

Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.
Cicero in Catilinam, II., III., IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

1882.

CLASSICS.

Xenophon, Anabasis, B. I.
Homer, Iliad, B. VI.
Cæsar, Bellum Britannicum (B. G. B. IV. c. 20-36, B. V,. c. 8-23.)
Cicero, Pro Archia.
Virgil, Æneid, B. II., vv. 1-317.
Ovid, Heroides, Epistles V., XIII.

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1883.

CLASSICS.

Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Æneid, B. V., vv. 1-361.
Ovid, Heroides, Epistles V., XIII.

1885.

CLASSICS.

Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.
Cicero, Cato Major.
Virgil, Æneid, B. I. vv. 1-304.
Ovid, Fasti, B. I. vv. 1-300.
Paper on Latin Grammar, on which special stress will be laid.
Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid. Bb. I., II., III.

ENGLISH.

A Paper on English Grammar.
Composition.
Critical analysis of a selected Poem:—
1881—Lady of the Lake, with special reference to Cantos V. & VI.
1882—The Deserted Village. The Task, B. III.
1883—Marmion, with special reference to Cantos V. and VI.
1884—Elegy written in a Country Churchyard. The Traveller.
1885—Lady of the Lake, with special reference to Cantos V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive Roman History, from the commencement of the Second Punic War to the Death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography--Gréece, Italy, and Asia Minor. Modern Geography---North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose:—
1881—Emile de Bonnechose, Lazare Hoche.

Or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, 7th edition, and Sommerville's Physical Geography.

A Student of any University in this Province who shall present a certificate of having passed within four years of his application an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

In Chancery.

[FERGUSON, V.C., JULY, 1881.

LANCEY v. JOHNSON.

Interim Injunction—Lease—Reformation of—Injury to reversion—Sinking oil wells.

The plaintiff leased land to the defendant for ninety-nine years, for a consideration of $25, and a rental of one cent per annum if demanded, and the lease contained covenants to pay rent and taxes.

The defendant shortly afterwards sunk an oil well upon the land, contrary to notice not to do so given him by the plaintiff, whereupon the plaintiff filed his bill to restrain him, alleging that the taking of oil from the land was an injury to his reversion. The defendant claimed the same rights as a tenant in fee, alleging that his contract was in reality one of purchase, and that the lease did not truly represent it, and asked for a reformation thereof.

Held, that the plaintiff was entitled to an interim injunction to restrain the defendant from working the well, until the questions between the parties were tried and determined.

Rae and *Moncrieff*, for plaintiff.

Street, for defendant.

Common Law Chambers.

[WILSON, C.J., 13TH JULY, 1881.

In re OSLER AND THE TORONTO, GREY AND BRUCE RAILWAY COMPANY.

O., being the holder of 14 bonds of the railway company issued on 1st May, 1876, payable on 1st January, 1881, with interest meanwhile half-yearly at six per cent. per annum, requested the secretary of the company to register the bonds under 38 Vict., cap. 56. This the secretary

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refused to do unless the intermediate transfers were produced and registered at the same time.

Held, that the secretary was bound to register the bonds without the production or registration of the transfers, and the summons for a mandamus was made absolute, with costs to be paid by the company.

McCarthy, Q.C., and *Osler, Q.C.*, for the summons.

S. H. Blake, Q.C., contra.

Ninth Division Court, Wentworth.

THE VICTORIA MUTUAL FIRE INSURANCE CO. v. CULKIN.

Mutual Insurance Company—Assessment—Irregular demand.

SINCLAIR Co. J. The plaintiffs sue for a number of assessments amounting to $19.40 upon a premium note made by the defendant to them. The plaintiffs' secretary sent a notice of the assessments claiming $21.20 as the amount due. Objection is now made that the plaintiffs cannot recover without shewing a *correct* notice of assessment. The principle of the case resembles that applicable to the right of a joint stock company to recover for calls on stock. In the former case the insured party agrees to pay such assessments as may be made for the general purposes of the company; in the latter the stockholder undertakes to pay the calls made by the company according to the terms of his contract. In both cases a notice demanding payment is necessary. And I think that in either case the company should be held to a strict performance of their duty, as their statutory remedies are stringent. If the plaintiffs can maintain this action where they have demanded only $1.80 too much, it could be also be maintained if their notice had demanded payment of $100.00 in excess. *Johnson* v. *Lyttle's Iron Agency*, 5 Chan. D. 687, appears to me to have a direct application here. It was there held that a notice of call was bad, because interest was claimed from the date of the call instead of from the day fixed for payment. James, L. J., at page 694, says, "It was the established rule of the Court of Chancery and of the Courts of Common Law that no forfeiture of property could be made, unless every condition precedent had been strictly and literally complied with. A very little inaccuracy is as fatal as the greatest." At the same page Mellish, L.J., says, "In this case the notice of the 21st of December was inaccurate in demanding the payment of interest from the date of the call. Was that a good notice? I think that if the notice departs in any respect from the statutory form, it is impossible for us to go into the question how much it departs."

The giving of the notice of assessment being a condition precedent to the maintenance of this action, its omission to be properly given in my judgment puts an end to the plaintiffs' case. The defendant cannot be made to pay more than the directors have assessed him for, and a demand by the secretary for a greater sum was entirely unauthorized.

W. F. Walker, for plaintiffs.

Osler, Q.C., for defendant.

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THE

CANADIAN LAW TIMES.

VOL. I. SEPTEMBER, 1881. No. 13.

ON THE LEGAL DEGREES OF MARRIAGE IN CANADA.

I.

WHAT is marriage? Story says, "I have throughout treated marriage as a contract in the common sense of the word, because this is the light in which it is ordinarily viewed by jurists, domestic as well as foreign. But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties, and in this view it has some peculiarities in its nature, character, operation and extent of obligation, different from what belong to ordinary contract" (*a*). But, says Bishop, "To say that marriage is a contract, when speaking of the marital condition, not of the agreement to assume it, is, we have seen, according to the current of the authorities, inaccurate; since they further declare that it differs in many particulars from other contracts. And when the differences are pointed out, we find that they have covered every quality of the marriage, and left nothing of the contract uncovered. All is submerged in the *status*. To term marriage, therefore, a contract is as great a practical inconvenience as to call a certain well-known engine for propel-

(*a*) Confl. Laws, § 108, note.

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ling railroad cars 'a horse,' adding 'but it differs from other horses in several important particulars,' and then to explain the particulars. More convenient would it be to use at once the word 'locomotive'" (*b*). And Foote:— "The crowning anomaly which results from the attempt to regard marriage as a contract in the legal sense of the term is to be found in the fact that it is a contract, if a contract at all, for the breach of which no action can lie and no damages be recovered." And in an explanatory note he adds, "The breach of a promise to marry is obviously a different thing" (*c*). And with respect to the laws and jurisdictions to which the *status* is subjected, we find it said, that "marriage, being a contract, the formal requisites of the contract are as in other cases subject in general to the *lex loci contractus*" (*d*). And again, "The result is that the validity of a marriage, with the rights depending on its validity, is governed by two different laws, viz., 1st, by the law of the parties' domicil which determines their *capacity* to contract; 2nd, by the law of the place where the marriage is celebrated, which determines in general the *formal requisites* of the marriage" (*e*).

There is, therefore, a contract *for* marriage, and there is a contract *of* marriage. The former is in reality the only contract, for the condition of life brought about by the solemization of the marriage is in reality a *status*, and not a continuing or a continuous contract. Upon this the text writers seem to agree, though some retain the use of the word "contract." The contract *for* marriage is purely civil, and the remedy for its breach is notorious.

Of the *status* of marriage, some look upon its duties and obligations as arising *jure divino*. Others regard it only as a civil *status*, the result of a civil contract, and others again attribute to it certain elements of both. While some claim a Divine prohibition against marrying within certain degrees

(*b*) Mar. & Div. 4th Ed. § 18.
(*c*) Priv. Int. Jur. p. 264.
(*d*) *Dicey* on Domicil, 155.
(*e*) *Ibid.* 155-6.

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of affinity and consanguinity, others allege as sufficient, obedience to physiological and natural laws; though it may be observed that obedience to the law of Nature is obedience to the Law of God. But in neither case are the respective votaries agreed as to what the Divine law is, nor what are sufficient natural causes for denying the mutual rights to proposing parties. We do not propose to enter into what must be a fruitless discussion upon these points. Our researches have been confined to the legal view of the case, without regard to any questions arising out of its social or religious aspects. It is sufficient to say, that, in dealing with the relative contractual capacities of the parties, or the essentials of marriage, and the formalities attendant upon solemnization thereof, we find different laws brought to bear, having regard to the domicils of the parties, the place where the marriage has been celebrated, and the forum where the marriage is questioned. So also where the domestic law only is set in motion, we find that the law of England requires that different tribunals should have exclusive jurisdiction over different questions relative to the *status* of marriage. According to the question to be tried, such and such a tribunal is to be sought. One Court takes cognizance of the previous relationship of the parties as an element affecting the validity of the marriage, while another looks to the formalities attendant upon its solemnization, or the contract only. In addition to the fact that questions concerning the relative contractual capacities of the parties may, in one aspect of the English law, be raised in the proper Courts, that in another aspect the question of compliance with certain formalities only may be tried in other proper Courts, it is further to be observed that in still another aspect there are civil incidents and appurtenant rights attributable to marriage *de facto*, which that state brings along with it—not dependent on contract or contractual capacity to a greater extent than that they may be said to be the result of the consummation of the contract for marriage, nor concerned with the relationship of the parties, nor with the essentials of the marriage contract to any greater extent than that they are the incidents

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of the *de facto* relationship of husband and wife. And these incidents and rights which are viewed in the last aspect are cognizable and enforceable in the Civil Courts on proof of a *de facto* marriage. Such are, speaking generally, the laws of property, contracts, etc., affecting husband and wife, which are daily administered in our own Courts. It is important to bear in mind these distinctions because upon them depends the result of our investigation.

We do not intend to busy ourselves with the conflict of laws upon marriage. Much reading can be found on this subject in works upon Marriage and Divorce, Conflict of Laws, Private International Jurisprudence, etc. And see an article thereon in the *Central Law Journal* of the 3rd June last, which we shortly reviewed at page 495 of this journal. Our object is to enquire what is the law of Canada, but more especially of Ontario, with respect to marriage, which will include a more particular enquiry as to that affecting the relative capacities of persons to contract matrimony with each other, and what jurisdiction the marriage is to be submitted to in order to test its regularity, legality or validity.

"The law of marriage in the British Colonies," says Shelford, "is either that which prevailed in England previously to the passing of the first Marriage Act in 1753, 26 Geo. II. cap. 33, or such as has been established by their own municipal law" (*f*). This is true with certain qualifications only. According to *Brook* v. *Brook* (*g*), the 26 Geo. II. cap. 33, which only applied to the formal requisites of certain marriages celebrated in England and did not touch the essentials of the contract, had, on that account, a territorial operation only. But it must be remarked that, though the intention of the Imperial Parliament was not to extend its operation into the Colonies, yet, being part of the general body of the law of England, it is a subject for enquiry whether it may have not been introduced therewith into those Colonies acquired after its passing which enjoy the English law. And we shall find that this Act was held to

(*f*) Mar. & Div. 43.
(*g*) 9 H. L. C. 193.

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be in force in Upper Canada by virtue of the 32 Geo. III. cap. 1 (*h*). Rather is the law of a Colony to be ascertained by reference to the English law at the date of its acquisition by the empire, its mode of acquisition and then existing laws, the constitution permitted to be retained by, or granted to, it, and its own municipal laws.

It will be sufficient for our purpose to say shortly, that, as far as Canada is concerned, the French law, with certain exceptions, was in force and continued in force till the Provincial Act, 32 Geo. III. cap. 1 (*i*). By that Statute it was enacted that, "From and after the passing of this Act, in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as the rule for the decision of the same." This Act was passed on the 15th October, 1792. In order, therefore, to arrive at our object, it will be necessary to enquire, First, what was the law of England respecting marriage on the 15th October, 1792, and what jurisdictions the several questions arising in respect thereof were properly submitted to. Secondly, what laws were introduced into the Colony by the above Act, and what Courts exist to enforce them. And thirdly, what changes, if any, have been made by our own Parliaments and Legislatures.

An answer to the first question propounded involves a short review of the Imperial Statutes affecting marriage with a glance at a few of the decisions touching them and respecting the jurisdiction of the several tribunals over marriage. We are not much concerned, in this enquiry, with the ceremony. At the Common Law a verbal contract was sufficient to constitute a contract of marriage. The contract of two persons in words of present mutual acceptance *(per verba de præsenti)* constituted an actual and legal marriage (*j*). The Statute, 26 Geo. II. cap. 33, established the necessity

(*h*) *R.* v. *Roblin*, 21 U. C. R. at p. 355.

(*i*) *Leith & Smith's* Bl. Com. 28.

(*j*) *Compton* v. *Bearcroft*, Bull. N. P. 113, 114; 2 Hagg. Cons. Rep. 444 *n*.

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for resort to a public and regular form, without which the relation of husband and wife could not be established. We shall find that, from a very early date, even before the Statutes of Henry VIII., Edward VI. and Elizabeth, the Ecclesiastical Courts exercised a jurisdiction over marriages, questioning their validity and punishing incest; while the Common Law Courts asked for proof of the ceremony or contract only. But of this, hereafter.

The reign of that expert in matrimonial affairs, King Henry VIII., was prolific in Marriage Acts. In the legislation of that reign we look for the first Marriage Act. It is the 25 Hen. VIII. cap. 22. It defined the degrees within which it should not be lawful for persons so related to marry. "No person * * shall from henceforth marry within the said degrees before rehearsed (*k*) * *; and in case any person * * hath been before married * * within any the degrees above expressed * * be separate from the bonds of such unlawful marriage that then every such separation shall be good, lawful, firm and permanent forever, and not by any power, authority, or means to be revoked or undone hereafter, and that the children proceeding and procreate under such unlawful marriage shall not be lawful ne legitimate." This Act, therefore, embodied in the general statute law of the Realm the essentials of marriage in respect of consanguinity and affinity; it demanded obedience thereto from all subjects indiscriminately; it enforced recognition in Civil as well as Ecclesiastical Courts of the illegality of alleged marriages founded upon sexual alliance between persons within the prohibited degrees. In every temporal Court in which the question of marriage or no marriage might arise for trial the previous relationship of the parties was an essential element of proof, as well as the fact of a contract. In questions of heirship, the legitimacy of the heir might be tried by testing the

(*k*) The son to marry his mother or step-mother; the brother, his sister; the father, the son's daughter; the father, the daughter's daughter; the son, the father's daughter by his step-mother; the son, his father's or mother's sister; the son, his uncle's wife; a man, his wife's daughter; a man, his son's wife's daughter; a man, his wife's daughter's daughter; a man, his wife's sister.

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marriage with this Act. We may here notice that these degrees are said by the Act to be "prohibited and detested by God's law." It, however, remained in force but a short time, being followed at intervals by 28 Hen. VIII. cap. 7; 28 Hen. VIII. cap. 16; 32 Hen. VIII. cap. 38; 2 & 3 Ed. VI. cap. 23; 1 & 2 Ph. & M. cap. 8; and 1 Eliz. cap. 1. Some doubt seems to have existed as to the effect of each of these Statutes upon those preceding, but they have finally been resolved in the manner which we shall shortly point out (*l*).

The first of these Acts, 28 Hen. VIII. cap. 7, repealed the 25 Hen. VIII. cap. 22, and in terms itself prohibited marriage within certain degrees therein named. So far, no material change was made, and the prohibition as to marrying within certain degrees remained part of the statute law (*m*). But this was in turn itself repealed and never revived. In *Wing* v. *Taylor* (*n*) it was said, "This examination of the Statutes has led us to the conclusion that the 28 Hen. VIII. cap. 7, was repealed and has not been revived, and that the 32 Hen. VIII. cap. 38, gives the rule by which we are to judge whether parties may lawfully marry or not." The next Act, 28 Hen. VIII. cap. 16, while making good certain marriages theretofore celebrated, did so validate only those "which be not prohibited by God's laws, limited and declared in the Act made in this present Parliament (*o*) for the establishment of the King's succession or otherwise by Holy Scripture." We have the authority of the Parliament therefore for what "God's law" was, "limited" though it was said to be. The simple effect of this reference to the previous statute was to embody the degrees prohibited thereby in the latter Act, honouring the prohibition with the nomenclature of "God's law." There is this additional fact to be noticed here, that marriages contrary to "Holy Scripture" are declared invalid by this

(*l*) *R.* v. *Chadwick*, 11 Q. B. 172; *Chitty's* Stat. Tit. "Marriage."

(*m*) See Chron. Tab. Stat. 1881, p. 43. Among the marriages prohibited by this Act is that with a deceased wife's sister.

(*n*) 2 Sw. & Tr. at p. 279.

(*o*) *i. e.* the 28 Hen. VIII. cap. 7.

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Act. The difficulty that a Common Law Court would have in ascertaining the validity of a marriage under such a clause is pointed out in *R.* v. *Chadwick*, which we will notice more fully hereafter. At this period then it remained part of the statute law of the realm, enforceable in all Courts, that a man should not marry within certain defined degrees, nor contrary to Holy Scripture. No material change even thus far had taken place, the prohibited degrees still remaining on the statute book. We gain only this additional information from the last enactment, that it reiterates the foundation of the prohibition to be upon God's law.

And so the law rested until the Defender of the Faith opined that his ecclesiastical Judges were more worthy than the Parliament to interpret Holy Scripture, God's law, and the Levitical degrees. By the 32 Hen. VIII. cap. 38, it was declared, "That all and every such marriages as within this Church of England shall be contracted between lawful persons (as by this Act we declare all persons to be lawful that be not prohibited by God's law to marry) * * shall be by authority of this present Parliament aforesaid deemed, etc., to be lawful * *; and that no reservation or prohibition, God's law except, shall trouble or impeach any marriages without the Levitical degrees; and that no person * * shall be admitted in any of the Spiritual Courts * * to any process or plea, or allegation, contrary to this aforesaid Act." By this Act, marriages within the Levitical degrees, or against God's law, are plainly forbidden. No doubt it would have been proper subject for enquiry in a Civil Court, where a marriage was questioned, whether or not the contracting parties were within the Levitical degrees. Whether the Levitical degrees within the meaning of the Act should be those declared by the letter of the Scripture, or should include like degrees by reasonable inference, and whether in interpreting the Scripture our present translation of the Old Testament should not be excluded, first, by reason of its being a translation, and, secondly, by reason of its not having been in existence when the Act was passed, are questions which happily do not arise in the common

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law tribunals, for the whole question was shortly afterwards relegated to the Spiritual Courts by the 2 & 3 Edw. VI. cap. 23. This Act declared the 32 Hen. VIII. cap. 38, as to pre-contracts, "to be repealed, and of no force or effect, and be reduced to the estate and order of the King's ecclesiastical laws of this Realm, which immediately before the making of the said Estatute in this case, were used in this Realm; so that * * when any cause or contract of marriage is pretended to have been made it shall be lawful to the King's ecclesiastical Judge of that place to hear and examine the said cause." And the ecclesiastical judge was to hear the cause and impose penalties "upon the disobedients and disturbers thereof as in times past, before the said Statute, the King's ecclesiastical judge by the King's ecclesiastical laws ought, and might have done if the said Statute had never been made" (*p*). The 1 & 2 Ph. & M. cap. 8, sec. 19, repealed the whole Statute of 32 Hen. VIII. cap. 38; but the 1 Eliz. cap. 1, sec. 11, revived it and left the law as it stood upon the passing of the 2 & 3 Edw. VI. cap. 23 (*q*). The result is (i) that for a few years marriage within certain defined degrees was expressly prohibited by Statute. (ii) That by the effect of various legislation the prohibited degrees *eo nomine* were dropped, and it was declared that no marriage against God's law or within the Levitical degrees should be valid. (iii) That the whole matter was relegated to the Spiritual Courts, which are the sole authorities for the interpretation of the law upon these questions, as we shall presently more clearly see.

There is this reflection left, that while certain degrees formerly prohibited by Statute are now left undefined, we yet have, as we have seen, the opinion of Parliament at one time expressed as to what God's law was conceived by them to be in respect of these degrees. Indeed, Lord Cranworth says in *Brook* v. *Brook*, "I think that this marriage (with a deceased wife's sister) is one clearly prohibited by the Statutes of Hen. VIII. wheresoever celebrated, and therefore

(*p*) 2 & 3 Edw. VI. cap. 23, sec. 2.
(*q*) *Burn's* Ecc. Law, Vol. II. Tit. "Marriage," p. 440.

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that the Statute of 5 & 6 Wm. IV. cap. 54, makes it absolutely void" (*r*). Yet it seems that the same case determines that these earlier Statutes were in fact repealed and never revived. And in *Wing* v. *Taylor* (*supra*) it was said to be the result of a review of these Statutes that "the 32 Hen. VIII. cap. 38, gives the rule by which we are to judge whether parties may lawfully marry or not." And such is the effect generally ascribed to this legislation. It is therefore probable that his Lordship's words intend that the earlier Statutes, being expressions of opinion by Parliament as to what God's law was, may be used as precedents merely in interpreting the expression "God's law," when used in a subsequent Act upon the same subject, without giving them the effect of binding enactments. And this is confirmed by reference to *R.* v. *Chadwick* (*supra*), in which Lord Denman said that the question what marriages were prohibited by God's law remained under that Act to be determined by the opinion of the Judges. And Coleridge, J., in the same case says, the former Acts may be used "simply as the best interpreters of the 32 Hen. VIII. cap. 38, which is clearly in force." And so we may add finally (iv), that in interpreting the expressions "God's law," and the "Levitical degrees," we have had the opinions of previous Parliaments, who, by their enactments, expressed what they considered to be "God's law" upon the subject, and who defined the "Levitical degrees," whether rightly or wrongly, by their Statutes.

We may therefore conclude that the law of England after the passing of these Acts was, that marriages contrary to God's law, or within the Levitical degrees, were unlawful by virtue of these Statutes. But this law was circumscribed and limited in its operation by the result of the same Statutes which enacted it. And this brings us to the question of jurisdiction.

The ground over which we now pass is undisputed, and we have to refer to but a few landmarks. In other words, we

(*r*) 9 H. L. C. at p. 229. The 5 & 6 Wm. VI. cap. 54, made void all those marriages which were before *voidable* only.

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are to examine what is the jurisdiction of the Ecclesiastical Courts over the question of the validity of marriages, and what jurisdiction the Civil or Temporal Courts exercise over the same question. We must be understood as speaking now of the law before the 5 & 6 Wm. IV. cap. 54, which makes void *ab initio* all marriages before that time voidable only. "The independent existence in England of a distinct ecclesiastical judicature dates from the reign of William the Conqueror. One of the most important of the changes introduced by William was to separate the jurisdiction of the Civil and Ecclesiastical Courts. There was a distinct demarcation of the areas in which the civil and ecclesiastical judicatures were to act" (*s*). And Shelford says, "From very ancient times the Ecclesiastical Courts have possessed the sole and exclusive cognizance of questioning and deciding directly the legality of marriage, and of enforcing specifically the rights and obligations regarding the marriage state (*t*). So, of illicit intercourse between the sexes and incestuous alliances, Blackstone says, "In the year 1650 * * incest and wilful adultery were made capital crimes. * * But at the Restoration * * it was not thought proper to renew a law of such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the spiritual Courts, according to the rules of the Canon Law. * * The Temporal Courts, therefore, take no cognizance of adultery otherwise than as a private injury"(*u*). And again the same learned commentator points out that the remedy in the Temporal Courts lies in an action on the case (*v*). In short the law of England (by which is meant the Common Law) looks upon marriage as a civil contract. The Civil Courts do not look upon unlawful marriage as a sin, but merely as a civil inconvenience. The punishment, or annulling of them, is the province of the Spiritual Courts, which act *pro salute animæ*. And the marriage is esteemed valid for all civil purposes unless a

(*s*) *Law. Mag. and Rev.* May, 1881, p. 248.
(*t*) Mar. & Div. p. 459.
(*u*) Com. IV. p. 65.
(*v*) *Ibid.* III. p. 136.

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separation is actually made by the Ecclesiastical Court in the lifetime of the parties (*w*). All questions, therefore, arising out of the personal relationship of the parties previous to their marriage come *solely* and *exclusively* within the jurisdiction of the Spiritual Courts, and all cognate offences are punishable there, and there only; in fact, the law is *dependent for its operation* upon the exercise of jurisdiction by these Courts. Their right arises not only by virtue of their ancient historical jurisdiction, but by positive statutory enactments, whereby the Civil Courts were as much prohibited from trying such causes as the Courts Christian were empowered to hear them.

For a short time, as we have seen, namely, from the 25th year of Henry VIII. till the second year of the reign of Edward VI., the Civil Judges shared with the Ecclesiastics the responsibility of determining the validity of marriages by virtue of their duty to enforce the statute law, of which the prohibition as to degrees of affinity and consanguinity formed part. What machinery might be put in motion for the nullifying of a marriage in the Civil Courts under one of these Acts, it is immaterial to enquire. It is not probable that proceedings having in view as their sole object the attainment of such an end, were ever instituted in a Common Law Court, or would have been entertained there. It is more than likely that if any such questions did arise in the Common Law Courts under these Acts, they arose in actions whose main object was the attainment of some other end, of which the validity or invalidity of a marriage was one link in the chain of proof. But in Edward's reign, their jurisdiction was entirely taken away, and "God's law" and the "Levitical degrees" were left without any better statutory interpretation than the previous opinions of Parliament expressed in the Statutes, by the effect of this Act and the two that followed it. A long debate is to be found upon these Acts in the case of *R.* v. *Chadwick* (*x*), at page 232 of the

(*w*) *Ibid.* I. p. 434, et seq.
(*x*) 11 Q. B. 173.

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report of which Lord Denman says: "The question what marriages were prohibited by God's law remained under that Act (32 Henry VIII. cap. 38) to be determined by the opinions of the Judges, though the only Judges who would be called upon to decide it at that time were those of the Ecclesiastical Courts, of whom the Statute intimates so much jealousy. Yet to procure certainty in the marriage contract, and to avoid the inconvenience of such disputes as has been complained of, the wise and public spirited men who passed the Act were content to trust the Ecclesiastical Judges with the future decisions on the point" (*y*). The Spiritual Courts were, however, subject to prohibition by the Common Law Courts if they attempted to nullify a marriage after the death of either party, and in some other cases. And so in a manner the latter Courts took cognizance of the validity or illegality of marriages, but not for the purpose of directly interfering with the marriage themselves. Indeed a marriage *de facto* is good at Common Law till avoided by the proper Court. For it is said that if a man marry one within the degrees prohibited, the issue between them is not by the Common Law a bastard until there be a divorce; for by that law the marriage is not till then void" (*z*).

Perhaps the jurisdiction of the Ecclesiastical Courts may best be defined by showing how far that of the Common Law Courts extended; for the latter exercised, as we have seen, a supervision and a restricting influence over them when they overstepped the bounds of their authority. Further than the ceremony the Civil Courts did not look for proof of a valid marriage except in cases of prohibition. This is well exemplified by the ancient authorities, which are unanimous upon the point, several of which we cite. From them it sufficiently appears that in the Temporal Courts the only issue that can be raised is marriage or no

(*y*) It is noteworthy that on account of the use of the two expressions, "God's law" and "Levitical degrees," marriages without the latter degrees might still be avoided if contrary to "God's law."

(*z*) *Burn's* Eccl. Law, vol. ii. p. 456.

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marriage, and the legality thereof cannot be questioned (*a*). "Covenant: That he should assure such a copyhold to the plaintiff if he married with his daughter *secundum leges ecclesiasticas*, and allegeth that he *rite et legitime* espoused the daughter of the defendant, etc. Issue was taken thereupon, and found for the plaintiff and exception taken, because it ought to be tried by certificate from the Bishop and not by a trial *per pais*. *Sed non allocatur*; for the marriage is only in issue, and not whether he were lawfully espoused" (*b*). "In debt on a bond, the defendant pleaded *ne unques accouple in loyal matrimony*; plaintiff demurred and had judgment, for it alters the trial; instead of trying *per pais* it puts the trial on a certificate from the ordinary; and secondly, it admits a marriage but denies the legality of it; whereas the marriage *de facto* is sufficient, and whether legal or not legal is nowise material" (*c*).

It would have been otherwise had the Statues defining the prohibited degrees remained in force, for the Civil Courts in administering the statute law would have been bound to enquire into the capacity of the parties to enter into a conjugal union with each other. So must they act now in England under the 5 & 6 William IV. cap. 54 (*d*). Nor did they recognize the Canon Law as such. For though the canons of the Church bound the clergy upon approval and sanction of the King, the Head of the Church, yet they had no binding effect *proprio vigore* upon the laity, but must be enforced by Statute (*e*). And Blackstone sums up the law, that, it being sinful in the persons who labour under the canonical disabilities, "to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrates' coercion, in order to separate the offenders, and inflict

(*a*) *Bassett* v. *Morgan*, 1 Lev. 41.

(*b*) *Fletcher* v. *Pynsett*, Cro. Jac. 102.

(*c*) *Alleyne* v. *Grey*, 2 Salk. 457; see also *Pride v. Earl of Bath*, 1 Salk. 120.

(*d*) See *Brook* v. *Brook* (*supra*) where the Court of Chancery on a Bill to carry the trusts of a will into effect, determined that a marriage, before that Act voidable only, was in fact void *ab initio* thereunder; *R.* v. *Chadwick* (*supra*).

(*e*) Per Lord Hardwicke in *Middleton* v. *Crofts*, 2 Atk. 650; *Bishop of St. David's* v. *Lucy*, 3 Carth. 485.

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penance for the offences *pro salute animarum*. But such marriages not being void *ab initio*, but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties (*f*). In short, the law considered such marriages legal, but the ecclesiastics considered the union to be unwholesome for the souls of the parties, separated them, and punished them for incest.

A striking example of the effect of the divided jurisdiction is to be found in *Harris* v. *Hicks* (*g*), where the Spiritual Court was proceeding to annul a marriage after the death of the wife, because she was sister to the first wife; and prohibition was granted as to annulling the marriage or bastardizing the issue, but the Spiritual Court was allowed to proceed to punish the incest. So there may be a legal, but incestuous, marriage.

We arrive then at the conclusion that it is not a sin (as Blackstone hath it) in the eyes of a Temporal Court to marry one within the prohibited degrees, incest not being punishable at law. That such a marriage is therefore, while it continues, legal, and draws towards it all the civil rights and incidents attributable to the *de facto* relationship of husband and wife. That the Common Law Courts will not enquire into the previous relationship of the parties, but will look for proof of the ceremony only, except in cases of prohibition to the Courts Christian. That the Ecclesiastical Courts do consider such a marriage sinful; but inasmuch as they proceed *pro salute animarum*, they must separate the parties in their lifetime, otherwise they will be prohibited from declaring the marriage null. That the marriage *de facto*, always "legal," if not so dissolved by the Spiritual Courts remains legal to all intents and purposes. That, though it is clearly part of the law of England that persons within the prohibited degrees shall not enter into conjugal union with each other, it is yet part of the *ecclesiastical*

(*f*) Com. I. 434.

(*g*) 2 Salk. 548.

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laws exclusively operating only upon exercise of that jurisdiction by the ecclesiastical Judges during a certain period.

And so the law as to the essentials of marriage remained undisturbed until the acquisition of Canada and until the passing of the Provincial Statute 32 Geo. III. cap. 1, which directs resort to be had to the laws of England as the rule for the decision of matters in controversy relative to property and civil rights.

A COURT WITHOUT JUDGES.

At the time of writing, appearances indicate that the elaborate system of Judicature now existing in Ontario—composed of Courts within Courts, Divisions within Divisions, with a perambulatory right in its Judges to sit anywhere, and having a kaleidoscopic capability of being moulded into any number of Divisions, single, double, or treble, according to the mathematical laws of permutations and combinations—is left without the old-fashioned decoration of Judges. The question of a Judiciary was left to the last, as if it were of minor importance. The President of the High Court of Justice for Ontario is still *in gremio legis*, yet writs are tested in his name.

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MUSIC IN THE COURTS.

This is the season for brass bands and noise, generally; the first, the fourth and the twelfth days of vacation are especially trying to any one who has an ear to hear, but has little music in his soul.

A desire to know what others have done and suffered when the air which they had to breathe was filled with music from instruments

> Of sundry kindes and sundry quality;
> Some like to dogs, that barked day and night,
> And some to cats, that wrawling still did cry,
> And some to beares, that groynd continually,
> And some to tygres, that did seem to gren
> And snar at all that ever passed by,

has induced us to turn over the pages of some of the reporters to see what the Judges say of brass bands and music generally—to see if they take the view of nuisances of this kind that peace and quiet loving citizens would expect. And now we submit the result of our research.

A Mr. Walker owned and inhabited a pleasant country place called by the patriotic name of Waterloo House, near Wolverhampton, England. Almost adjoining were the grounds of Molineux House, where were held frequent *fêtes*, enlivened with music and dancing. These performances drew together great crowds of persons, not only of the well to do class, who paid their money and entered within the bounds, but also of the profane vulgar, who contented themselves with a view from the public road, or from the vantage ground offered by Mr. Walker's walls. A brass band of eighteen stalwart performers played so lustily and with such good courage every Monday and Friday, that the noise and din—*i. e.*, the music—could be heard distinctly two and a half miles away. Only one hundred yards intervened between Mr. Walker's house and the band stand. The shouting of the people was often loud and continuous,

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and almost more than the family could stand, while the whizzing and the whirring, the rattle and the rumble of the fireworks were more than the horses could stand quietly, and they broke their halters and injured themselves. To the Court of Chancery Mr. Walker went, and found what so many troubled men have found before him—relief. Although it was the collecting of the noisy and disorderly crowd that was deemed the nuisance, still Sir W. Page Wood, V.C., said, "I confess I have a strong opinion that the setting up a powerful brass band, which plays twice a week for several hours, in the immediate vicinity of a gentleman's house, is a nuisance which a Court of Equity will restrain. And I have a still clearer opinion that the noise of fire-works (to say nothing of the damage that may be occasioned by falling rocket sticks,) is a serious nuisance" (*a*). These are truly comfortable words for unfortunate dwellers near public gardens.

Any act or omission of a person whereby sensible injury is caused to the property of another, or whereby the ordinary physical comfort of human existence in such property is materially interfered with, is a nuisance and is actionable (*b*). One whose nerves are so highly strung that the least discordant air affects them unpleasantly, may not always find the relief he may seek; for the inconvenience must be more than fanciful, more than one of mere delicacy and fastidiousness; in fact, one materially interfering with the ordinary comfort physically of human existence,—not merely elegant or dainty modes and habits of living, but according to the plain and sober and simple notions in vogue among English people (*c*).

In 1868, it was held that the playing of a trombone, or bass viol (the complainant's ear was not sufficiently educated to distinguish between them), singing the "Cure," the applauding, stamping and laughing of the giddy multitude, which could be heard for several hours every night all

(*a*) *Walker* v. *Brewster*, L. R. 5 Eq. 25.
(*b*) *Underhill* on Torts, 203.
(*c*) *Walker* v. *Selfe*, 15 Jur. 416.

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over Mr. Inchbald's house, were such an inconvenience and such an invasion of the domestic comfort and enjoyment of his house, and such a material interference with the comfort of the inhabitants, as to entitle Mr. I. to come and ask the Court to put a stop to the performance in a circus one hundred yards or more away (*d*). It would seem that the Court will not listen so keenly to complaints of a nuisance lasting only a short time as they will in the case of a permanent one (*e*).

Wood, in his learned treatise on the law of nuisances, says, "the music of a hand organ or a brass band may, for a short time, be pleasant to the ear; but if kept up for undue periods of time, it becomes a serious annoyance, productive of absolute physical discomfort and an intolerable nuisance, and would be actionable as such" (*f*). Mr. Smith was successfully indicted for committing a nuisance, when he had disturbed the neighbourhood by making a loud noise with a speaking trumpet in the night time (*g*).

The poets talk about the melody of the bells, bells, bells —the tintinabulation that so musically wells from the jingling and the tinkling of the bells. The lawyers, truer friends to peace and quiet, say that the ringing of church bells—the tolling, tolling, tolling,—where so frequent and loud as to annoy a person living near by, will be restrained. This was done in *Soltau* v. *De Held* (*h*), where the ringing and tolling of the bells of a chapel of the Redemptorist Fathers was complained against by a neighbour as offensive alike to the ears and feelings of himself and family, injurious and distressing to invalids in his house, tending to depreciate the value of his property and lastly, disturbing to the devotions of his family. (How this was does not appear. Was it by the noise giving rise to angry feelings and causing breaches of the third commandment?) The V. C. would not, however, assent to the proposition that, in all circumstances and under all conditions, the sound of bells must be a nuisance. A peal of bells, he said, may

(*d*) *Inchbald* v. *Barrington*, L. R. 4 Chy. 388.
(*e*) *Ibid.* p. 395.
(*f*) Sec. 549.
(*g*) *R.* v. *Smith*, 1 Str. 704.
(*h*) 2 Sim. N. S. 133.

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be, and, no doubt, is, an extreme nuisance, and, perhaps, an intolerable nuisance to a person who lives within a very few feet or yards of them; but to a person who lives at a distance from them, although he is within the reach of their sound, so far from its being a nuisance or an inconvenience, it may be a positive pleasure; distance may lend enchantment to the ear. It would appear that if these bells had belonged to the Church of England, and had swung out to call people to the parish church, they would have been recognised by law, and would have been more highly privileged, although the Judge did not insinuate that it was unlawful for Roman Catholics to have bells attached to their places of worship.

In determining whether a noise is a nuisance, regard is always had to the character or quality of the noise, as well as its quantity and the time during which it exists (*i*).

Any one who collects together a crowd of people to the annoyance of the neighbours commits a nuisance for which he is liable (*j*). One has no right to block up the public streets in any way. As Lord Ellenborough once said, apropos of carriages and coaches standing in the way, "the King's highway is not to be used as a stable-yard" (*k*); so we may conclude that the highway should not be used as a music hall, and musicians grinding out popular melodies from barrel organs may be liable for nuisances when the listening crowds cause inconvenience (*l*). The rule of law against blocking up the streets is much neglected, and great advantage would arise from a strict and steady enforcement of it (*m*). Common sense, however, must be used with reference to transactions of this kind (*n*).

In North Carolina, it was held that the ordinary obstruction of a street by a lawful procession celebrating the

(*i*) *Dennis* v. *Eckhard*, 3 Grant (Pa.) 390; *Dargan* v. *Waddell*, 9 Ired. N. C. 244.

(*j*) *Rex* v. *Moore*, 3 B. & Ad. 184. (*k*) *R.* v. *Cross*, 3 Camp. 224.

(*l*) *Wood* on Nuisances, sec. 549. (*m*) *R.* v. *Jones*, 3 Camp. 230.

(*n*) *Walker* v. *Brewster*, L. R. 5 Eq. 35.

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Emancipation Proclamation, and the noise of a drum and fife therein, were not *per se* a nuisance (*o*).

Other musical instruments besides those already referred to have been judicially noticed. In Pennsylvania, it was held that a piano was a necessary with which, under some circumstances, a husband was bound to supply his wife (*p*). We opine it would not be a necessary if *res angustæ domi* rendered "The Song of the Shirt" to the accompanying click, click, click, of a sewing machine compulsory upon the mistress.

At one time, Mr. Justice Wilson favoured the concertina; he deemed it an article of amusement or pleasure; he did not say which. The question was this, Was Bruty entitled to carry his concertina with him on the Grand Trunk Railway as a part of his ordinary baggage? The learned Judge, after mentioning several articles that were luggage, remarked, "The concertina, being a small article, may also be counted with those articles of amusement or pleasure which it is permissible to carry as part of one's personal baggage. One person may prefer a gun, a second a fishing rod, a third a book, by may of amusement; and there is no reason why a fourth should not be indulged with a flute, a violin or a concertina, if he desires it. But," added the Judge perhaps (the disjunctive conjunction seems to imply it), with a tone of regret, "the learned Chief Justice (Richards) and my brother Morrison are of opinion that the concertina should be disallowed" (*q*). And so it was; and the law established that carriers are not bound to take the favorite musical instruments of their passengers as baggage.

It would appear that even Judge Wilson would not have let a young lady carry her piano or organ in her Saratoga trunk because he would have permitted the concertina to pass—it being "a small article"; for while he admitted a sportsman's gun and fishing tackle within the category of personal baggage, he refused to throw open the door of the baggage van to take in a tent or a boat for the

(*o*) *State* v. *Hughes*, 72 N. C. 25.
(*p*) *Parke* v. *Klieber*, 37 Pa. St. 251.
(*q*) *Bruty* v. *G. T. R.* 32 U. C. R. 66.

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hunter or fisher (*r*). It was not from a mere love of noise, even if it was from a passion for the harmony of sweet sounds, that the learned Judge let the concertina go free, for he at the same time refused to consider the saws of the harmonious carpenter, Mr. Bruty, or even his sewing machine, as baggage.

A dog, another noise-producing machine, cannot be taken as baggage (*s*).

Formerly, in Toronto, the police authorities had very strict puritanical notions as to what music should be performed on the Lord's Day. About thirteen years ago, a policeman entered, without a warrant, the room of a stranger, arrested him, and confined him all night in a filthy cell, because he was playing some simple airs on a violin at the back window of his lodging on Sunday. The musician was heavily fined and admonished by the magistrate the next day. How cultivated must have been "Bobby's" ear—it must have been a long one—to tell where sacred music ends and secular begins (*t*). Whether such music would now be allowed we know not; it depends not upon the Chancellor's foot, but upon the Chief of police's ear.

Although

> 'Tis love creates their melody, and all
> Their waste of music is the voice of love,

yet singing birds are not among the things essentially necessary for a wife; at least it was so held where the lady had invested in between six and seven hundred of lories, avadavats, love birds, bishop birds, cardinals, quakers, cut-throats and manikins, to the tune of about one thousand pounds in less than a year; and the dealer in this kind of music was told that he could not make the poor husband pay (*u*). How would it be as to the purchase of a single canary bird?

(To be Concluded.)

(*r*) *Hudston* v. *Midland Rw. Co.*, L. R. 4 Q. B. 366.
(*s*) *Cantling* v. *Hamilton, etc., Rw.*, 54 Mo. 385.
(*t*) 4 C. L. J., N. S. 165.
(*u*) *Freestone* v. *Butcher*, 9 Car. & P. 643.

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EDITORIAL REVIEW.

Advertising Maniacs.

Attention has not infrequently been called to the hybrid advertisements of J. P.s, sewing-machine agents, land-sharks, *et hoc genus omne*, who declare that they do the very best conveyancing at the very lowest prices. We can be satisfied with regarding these unprofessional conveyancers with a certain amount of contempt, as we are so far powerless to protect ourselves and the public from their inroads; but we have no patience with professional men who imitate them. The advertising mania has extended as far as the skirts of the profession, we regret to say; and now, before it spreads further, is the time for the Discipline Committee under their extraordinary powers to put a stop to it once and forever. Not long ago a solicitor advertised that he would do conveyancing at half the usual prices for cash; but, unlike his unprofessional advertising brethren, he very wisely refrained from guaranteeing its quality. It is but lately that another solicitor, of a good many years standing, flooded the profession with printed cards, containing at the head thereof his name in large letters. Following this are his many virtues and qualifications, not the least of which, he thinks, is that he was ESTABLISHED 18—. He then promises to do anything in the following lines of business:—Law, Loaning, Insurance—fire and life, Sales of Land, and many other things, and all this by virtue of being *a Barrister;* and he expressly abjures all connection with "any company." He does not confine himself to cards only, but haunts the local papers of the place at which he practises. This is "running a law dive" with a vengeance. It is high time that the Benchers took some notice of this most unbecoming and unprofessional self-laudation and charlatanry. A few timely reprimands might have a most salutary effect.

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Music in the Courts.

Mr. Rogers' article, bearing the above title, came to hand just too late for the August number. It may, however, serve as an antidote to the headaches produced by the study of the Judicature Act during the hot weather. We predict for the next few years a little "Music in the Courts," which have now been furnished with "all the modern improvements." But it will be rather the boisterous clanging of the elements of jurisprudence in the new wheels of justice, than the harmonious hum of a well-ordered and lightly running machine.

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BOOK REVIEWS.

The Law of Registration of Titles in Ontario, being an annotation of The Registry Act, together with a collection of practical forms, tariff of fees, etc., by EDWARD HERBERT TIFFANY, of Osgoode Hall, Barrister-at-law. Carswell & Co., Law Publishers, Toronto and Edinburgh, 1881.

After many delays, Mr. Tiffany's book on The Registry Act has made its appearance. Perhaps no subject presents such a favourable field for an Ontario annotator as this Act. A matter not so much of local convenience as of universal public policy, the question of registration forms the keystone of the practice of conveyancing at the present day. The destiny of the law respecting the transfer of real property, not yet worked out, is being shaped and controlled by some such policy or measure as this law over a vast deal of civilized territory. Our own legislation, though not so advanced as that of Australia, is yet in such a state that, in combination with the laws of England affecting real estate and its transfer, it affords as great a protection to honest dealers in land as it seems possible to give. Its general policy is easily understood, though intricate questions sometimes arise in the construction of the Act which, in itself, is anything but a model of drafting.

With such a subject and a host of decisions upon it and similar enactments in English, Irish, Canadian and American Courts, we must confess to a feeling of disappointment that more has not been made of it.

Mr. Tiffany seldom expresses his own opinion, and perhaps wisely. He is cautious, when he does venture to do so, to so frame his sentences as not to compromise himself, whether he speaks in a dead language or in a modern tongue. For instance, when he says "*In acquali jure melior est conditis possidentis*," as he does at page 332, though he will find few ready to agree with him, he will find none so hardy as to

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give him a flat contradiction. The facility with which the English language may be manipulated so as to develop a plain and homely assertion of a simple fact into a rhetorical puzzle, is exemplified by the following, taken from page 63: "The word 'he' between the words 'business' and 'finds,' in the third line from the bottom of the section, is a typographical omission in the Act as contained in the Revised Statutes." A reference to the Act will show that the word "he" is not "between the words 'business' and 'finds' in the third line, etc." at all, and this forms the key to the riddle. The author's freaks, which perhaps after all are due to grossly careless proof-reading, assume a certain amount of humour at page 401, where a form of abstract index is given, in which the consideration in a conveyance from Alexander Erie to James Erie is said to be "$1, and *not* love and affection."

To turn to the substance. At page 12 the learned author defines the word "conveyance," which is used in the second section of the Act, as including "a feoffment, grant, lease, surrender, or other assurance of land;" and he cites as his authority R S. O. cap. 98, sec. 1, s-s. 2. On reference to this Act it will appear that the words and expressions therein mentioned, "which in their ordinary signification have a more confined or a different meaning," shall in that Act be interpreted as therein set out; and our author's adopted definition of "conveyance" is then given. It is plain, therefore, that the interpretation given therein to the word "conveyance," and limited to that Act by its express words, cannot be adopted as the interpretation of a word which in its ordinary acceptation, or in another Act, may have a different meaning—either more extended or contracted. If a definition had been required, a reference to one of the numerous law dictionaries would have repaid the enquirer. Again, section 92, which relates to the very practical subject of fees, though not interpreted in the text, is made the subject of opinion in a tabulated statement of fees at page 439, in the appendix. According to the learned commentator, the fees upon an instrument of *seven folios and under* (rather say "seven folios, *or* under"—it

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can't be both), requiring registration in two localities, are $2.50. This is no doubt true of seven folios, but not of anything under that, as we read the Act. An instrument of six folios would, according to Mr. Tiffany, cost the same as one of seven. But the Act says that it shall be paid for at the rate of forty cents for the certificate, and for the instrument, fifteen cents for *every* 100 words, or the fractional part thereof up to 1,400, the registration and copying being considered as separate registrations. We should therefore make the fees for registration in two localities of an instrument of six folios as follows:—

For the Certificate and Entries.	40
For 600 words at 15c. for each 100 in one locality	90
For the same in the other locality	90
Total.....	$2 20

There is nothing in the section making the fees the same for all instruments up to seven folios, as there is in that regulating the fees for single registration of instruments of the same length. Nor do we see why such a qualification should be imported into the third part of the section; for by its terms the Registrar is paid at the rate of fifteen cents per folio for all actual copying up to fourteen folios. In the absence of authority for the construction put upon this part of the section, the table of fees, instead of being an assistance to the practitioner, must as to this much be productive of doubt only. With the exception of this and a mis-print of $3.20 for $3.10, the table appears to be correct. While submitting the work before us to such a test as we have done, we are glad to say that, notwithstanding the inaccuracies we have referred to, it is a creditable and useful production. The three notable things dealt with by the Act are the use of the Registrar's certificates on registered instruments as *prima facie* evidence of their due execution, the general policy and effect of the Act upon the doctrines of notice, and the security afforded to the honest and viligant by giving effect to priority of registration. Of these we regret to say that the first is summarily disposed of with a passing notice to *The Can. Perm. L. & S. Co.* v. *Page*, 30 C. P. 1. Intimately

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connected with the sections governing the proof of deeds by the Registrar's certificate, are the Witnesses and Evidence Act, and the Vendors and Purchasers Act, all of which have worked a revolution in proving titles both on contracts of sale and in actions and suits. By means of the combined effect of these Acts cases easily may, and actually do occur, in which a title may be proved from the Crown to the present day by production of deeds simply. Upon the other subjects however, namely, Priority, Notice and also Consolidation of mortgages, much useful reading is given; and we think the learned annotator has redeemed himself. He has shown great industry in the collection of authorities upon these points, and his remarks may be read with profit by every practitioner. Indeed, notwithstanding the little nausea occasioned by the discovery of errors, due simply to carelessness both in observation and composition, we can cheerfully recommend the book to every—solicitor, (we think that is the correct term now).

The Law of the Road, or the Wrongs and Rights of a Traveller, by R. VASHON ROGERS, JR., of Osgoode Hall, Barrister-at-Law. Carswell & Company, Edinburgh and Toronto, 1881.

This little book has now reached its third edition. It is now published in Scotland, having been before published both in Ontario and in the United States where it received a large amount of attention, partly on account of its novelty of style, and partly because it was found that after all it was not such a huge joke, but that it contained sound law at every step. The writer first perused the work when a student at law, and the feeling of pleasure at finding that there were *some* books evidently which were not so unpalatable as the much dreaded *Leith's* Blackstone, has never quite passed away. Many of the points illustrated remained fixed in memory, and, by being associated with the narrative, formed a better illustration of the application

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of a principle of law than any theoretical explanation could do. It is a fact patent to every one, the truth of which is exemplified every day, that a practitioner always has a clearer and more vivid conception of the true meaning of a rule of law after he has had occasion to apply it to actual facts presented to him in the course of litigation. The facts of his case become by long association familiar and interesting to him, and eludicate those rules which apply to it. We think it may be said for Mr. Rogers, that the style which he has adopted is very well suited to bringing vividly before one the practical working of the law of the road. For instance, a little scene like that in which the rather officious hero figures somewhat to his discomfiture would not easily be forgotten. "Here I was interrupted by the sudden cry of 'Tickets! tickets!' which rang through the car. The conductor entered and stopped in front of a gentleman, who said:—'I have not got my ticket here. I hold a season one.' 'That won't do, sir,' said the man. 'Holders of annual tickets travelling on the line are bound to produce their tickets as much as ordinary passengers. So take your choice—show your ticket—pay your fare—or out you go.' 'Well,' replied the gentleman, 'sooner than be turned out with my baggage, wherever you in your wisdom should deem best, I will pay my fare.' 'Don't do it, sir,' I almost without intending it called out, so eager was in my crusade against the company, 'the conductor has no right to demand the ticket nor receive any fare, nor in fact can he exercise any of the powers of his office, or meddle or interfere with any passenger or his baggage, unless he has upon his hat or cap a badge indicating his office; and a company, before they can enforce any law as to the production of tickets, must bring themselves strictly within the terms of the law.' 'Sold again!' cried the wretched official, as he lugged out from his coat pocket a small cap ornamented with the word '*Conductor*,' and showing it to me, he added—'you pretend to know a great deal about the law, so perhaps you recollect that the statute does not say that the cap or hat with the badge is to be worn on the

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head. The law in its wisdom assumed that officers of the company would or must have caps or hats, and that they would or must wear them, and wear them upon the head, but it did not enact that they should do so. It never entered the wise noddles of the legislators at Ottawa that a man might own two caps, a jolly fur one for use, and another little chap for show.' " Such an incident, read by layman or lawyer, would not be easily forgotten. We cannot go so far as to recommend that law books should always be written in this style; but we do say that it is written not without effect. Popular law books are dangerous things as well as of questionable value. But this book might be read widely and profitably. Enough would be learned from it to give a general idea of what a traveller should do to keep himself within the pale of the law, if he he has not already learned to be careful, read rules, and observe them. Authority is cited at every step for the positions taken. We can say honestly that, whether the book be read by professional men or by the people at large, it will furnish sound and valuable information to whomsoever undertakes its perusal.

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REVIEW OF EXCHANGES.

American Law Review.—August, 1881.

Liability of Officers acting in a Judicial Capacity—II. By ARTHUR BIDDLE. The liability of quasi-judicial officers is treated in this part. Justices of the Peace may sometimes be Judges of Courts of Record, in which case their records cannot be impeached, and the rule as to their liability is the same as that governing Judges of Courts of Record. But otherwise they are liable to action for a malicious or corrupt discharge of their discretionary duties. But the act must have been influenced by a partial, corrupt or malicious motive. Where the *judgment* is wrong, but the *heart* and intention are pure, they should not be punished. But gross ignorance may amount to actual depravity. So any action contrary to Statute, though without a corrupt motive, is punishable. Instances are then given of ministerial and judicial acts. The liability of election officers is then discussed, and the cases down to *Ashby* v. *White*, 2 Ld. Raym. 938, which settled the law in England, are considered. Liability of municipal officers is considered. *Quære*, whether, under our municipal laws, the duties of municipalities are not absolute, and whether the officers can be said to be acting upon discretion thereunder. Miscellaneous cases then follow.

Why should not a Decedent's Real Estate descend and be administered like Personalty? By WM. REYNOLDS. The usual arguments of convenience are used, and references are made to several States in which the object contended for has been brought about by legislation.

The Subjection of the State to Law. By ROGER FOSTER. "The statement that the State is not subject to the law, seems to most American lawyers an absurdity." The fact of the United States existing under written constitutions, is of course suggestive of the opinion, that while these writings exist they must be followed. It is not that the State created them and "the potter has power over the clay," but that the State arose out of them, and exists by virtue of them; the term "State" here being used, as the learned writer puts it, as "organized power." The word "Federation," the expression "Federal power," the name "United States," are all suggestive of compact. The fact of a people agreeing to an instrument and authorizing its signature by its delegates, is suggestive of contract. In this aspect it is quite conceivable that whether we view the "State" as the people or as the "organized power" represented by the Executive, both parties to the compact must observe it in

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good faith. It is clear, then, that each individual must do his part towards the people in observing the laws and constitution; and it is equally clear that the people at large, or the "organized power," must keep faith under their compact with each citizen. There should be mutuality of obligation. The idea of the subjection of the State to law, is more easily conceived in the case of the Dominion of Canada with its several Provinces, where the constitution is granted by a superior power to which allegiance is due, and does not come directly from the people inhabiting the territory within which it is to operate. Such a course of reasoning is of course quite inapplicable to a constitution like that of Great Britain. The learned writer becomes rather bilious when he refers to the maxim "the king can do no wrong," which he says "has no place in American jurisprudence." Having established the truth of the proposition involving the fallibility of the "organized power" of the United States, he concludes upon its mere enunciation that there is therefore no reason why the maxim "the king can do no wrong" should not eventually be abolished from the jurisprudence of all countries. After making the discovery that the truth lies in American jurisprudence only, it is turning rather a sharp curve to allege in the next sentence that an insularity of thought seems to prevent most Englishmen from seeking for truth beyond the limits of Great Britain. Surely the learned writer cannot shut his eyes to the words of respect and laudation, in which some of the most eminent English Judges have spoken of the American jurists. Nor can we believe that the learned writer really means to account for the continued existence of the maxim in English jurisprudence by classifying it with the "accidents attached to personal government."

Central Law Journal.—22nd July, 1881.

Telegraph Privilege, by FRANCIS WHARTON. Several English election cases are mentioned in which the question arose whether the Court should compel the production of telegrams to be put in evidence. It was finally decided that, by reason merely of their being transmitted by Government service, they did not lose their character of private telegrams and become Government papers. The American authorities are said to conform to this ruling. It is hardly necessary to refer to our statutory provision for proof of telegrams, by giving notice of intention to use the copy received, whereby the Legislature has expressly recognized their liability to be used in evidence.

Lawyer and Client—Right of Action for Fees. ANONYMOUS. It is said that the American cases rarely make any distinction between the office of counsellor and attorney in these actions. It has been almost universally adopted as the rule in the United States, that counsel may recover fees in an action; because, to hold otherwise would be incompatible with the business and necessities of both counsel and client. In New Jersey the English doctrine has remained unimpaired. In Ontario the case of *McDougall* v. *Campbell*, 41 U. C. R. 332, is fresh in memory. It was there held that counsel may recover fees by action.

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Ibid.—*29th July*, 1881.

Impeachment of Verdict for Misconduct, by HENRY WADE ROGERS. The right to set aside a verdict for misconduct being established, American authority is cited to show that the affidavits of jurors may be received, though with great caution; that of an officer to show his own misconduct is entitled to no weight for it shows that he has violated his oath of office. American and one or two English cases are cited for the following:—Affidavits of jurors cannot be received to show the motives or intentions of jurors, nor the grounds of the verdict, nor that a juror misunderstood the charge, nor that he stated facts to his fellows not given in evidence, nor to show the mode of arriving at the verdict, nor that a juror did not assent to the verdict, nor that a mistake was made as to facts or merits, nor to show any irregularity on the part of jurors; and some authority can be given to show that they may not be received to show misconduct by the officer in charge. Affidavits are admissible to sustain verdicts. Reasons for rejecting jurors' affidavits:—"(i) Their reception would tend to defeat the solemn acts of jurors under oath. (ii) It would afford an opportunity to tamper with jurors after the rendering of their verdict. (iii) It would give a dissatisfied juror the means of destroying a verdict at any time after he had assented to it. (iv) A juror would be unworthy of belief in testifying to the violation of his official oath." A verdict is not necessarily set aside for misconduct. The party must be injured; and if he knew of the misconduct before verdict and speculated on the chance of its being in his favour it is a waiver. Drinking intoxicating liquor is not misconduct unless the jurors' minds were thereby affected, though there are authorities contra. Entertaining jurors is misconduct by party. Other instances of misconduct are given. The cases cited are almost exclusively American.

Ibid.—*5th August*, 1881.

Unincorporated Joint Stock Companies in the United States, by MARSHALL D. EWELL, treats of such companies as they exist independent of statutory regulation, and as organized under or regulated by Statute.

Ibid.—*12th August*, 1881.

Conclusive Effect of Judgments, by A. L. MERRIMAN, discusses cases in which equity has refused to interfere with judgments obtained at law.

Ibid.—*19th August*, 1881.

Miscegenetic Marriages, by ADELBERT HAMILTON. Marriage within the United States is outside the jurisdiction of the Federal Government; or, as said by Jameson, J., in *Roth* v. *Ehman*, 13 *Chicago Legal News* 354, "when it is determined that a man is a citizen of the United States, nothing is thereby settled as to his matrimonial capacity, since there is nothing in the federal laws upon that subject." It is under the control of the several States. Statutes prohibiting miscegenation have been held valid notwithstanding that the white person may only be sub-

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jected to punishment. "Who are within the Statutes" induces a rehearsal of expressions indicative of the presence of dark blood in a person with decisions on them. The Statutes cannot be evaded by the parties being married in a State which permits such marriages, as the law of their domicil governs. Though these marriages are void, it has been held that in a suit by a reputed wife against her reputed husband for perpetual alimony, the husband is estopped from denying her competency to contract the marriage by reason of colour if there were a *de facto* marriage.

Criminal Law Magazine.—July, 1881.

Crimes against the Elective Franchise. ANONYMOUS. This article reviews decisions upon various Statutes of the several States, making abuses of the franchise offences.

Irish Law Times.—16th July, 1881.

Contracts to Carry Goods at Owner's Risk, concluded in the following number. Carriers must use clear and precise words if they intend to free themselves from their ordinary liability. A contract will not free the carrier from liability for the excepted perils if his negligence or misconduct contributed to loss by them. By the use of the term "owner's risk," the owner assumes the risks arising from ordinary dangers of transportation, and the carrier is liable only for those dangers which with ordinary care and prudence might be avoided. "Owner's risk" will not excuse delay by the carrier. If defectively packed goods are received by the carrier at owner's risk, in the absence of wilful misconduct the carrier is not liable for resulting damage. Numerous cases are cited.

Ibid.—30th July, 1881.

Offences Induced by Police Officers. Some very salutary remarks are quoted as to the iniquity of inciting crimes merely for the purpose of bringing the offenders to justice. Two recent cases are discussed in which convictions so obtained were quashed. Our own impression is that, where an officer of justice learns of the intended commission of an offence in time to prevent it, and, instead of preventing it, facilitates it in order that he may bring the offender to justice, he should be brought to justice himself. His duty is to prevent crime; not simply to make examples of criminals that others may be deterred from committing crime. With regard to a certain class of detectives, who roam about with the avowed object of inducing the commission of various offences, that they may share in the penalty, it is not too much to say that they are in reality the guilty parties, the originators, the instigators of the offence, the principal offenders, and should be treated as such. In such a case, which occurred in Scotland lately, a conviction was quashed without considering the matter, the repayment of the fine was ordered, and the appellant got his costs.

Ibid.—6th August, 1881.

Rights of Life-tenants in reference to timber blown down. As regards timber wrongfully cut down, it belongs to the one who has the

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first estate of inheritance; and the life-tenant would have no claim to the interest of the fund. Where cut by order of the Court, the tenant for life is entitled to the interest. The remainder-man is entitled to windfalls.

Law Journal.—16*th July*, 1881.

Part Performance. The effect of the Judicature Act upon this doctrine is discussed. *Britain* v. *Rossiter*, 48 L. J. Ex. 363, is cited to show that "the true principle of the Judicature Act is that it confers no right which no one possessed before, either in the Courts of Law or of Equity. If it did, it would alter the rights of parties, whereas, in truth, it only transfers the procedure." An attempt has been made to extend the principle to agreements other than those to which Equity formerly applied it, with the above result. The judicial definition of part performance lately adopted is that "the acts relied upon must be such as could have been done with no other view or design than to perform the agreement."

Ibid.—23*rd July*, 1881.

Insurance as between Vendor and Purchaser. A case of *Raynor* v. *Preston*, reported in the July number of the L. J. Reports, is considered. There was a divergence of opinion among the Judges. On the one hand, it was said where a man sells a house without mentioning a policy, he does not sell the policy, which is for his own protection from fire. On the other hand, it was said that the relationship between the parties is that of trustee and *cestui que trust*, and that whatever the trustee receives as of right or by good fortune out of the trust, he is bound to hand over to his *cestui que trust*.

Mortgagee and limitation of actions. Several recent cases between mortgagee and mortgagor are discussed.

Ibid.—30*th July*, 1881.

The assignment of debts. That section of the Judicature Act, 1873, which deals with this subject is discussed. It has little interest for Ontario, where the legislation is more specific than the section referred to, and the inconveniences as to suing do not arise.

Ibid.—6*th August*, 1881.

Transfers without bills of sale. It is pointed out that a bill of sale is not necessary under the English Act upon a sale of chattels; but, if given, it must be registered. Though our own Act is something of a puzzle, it has not this defect.

Law Magazine and Review.—*May*, 1881.

England's Treaties of Guarantee, by J. E. C. MUNRO, LL.M.

New Trials in Felonies, by W. HARRIS FALOON. A review of some cases in which the question has arisen. The policy of granting new trials is discussed. An acquittal is final, according to all constitutional law, on the ground of its being *in favorem vitæ et libertatis*. Why should

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not the principle be applied so that a conviction shall not be had save in strict accordance with the law of the land?

Ecclesiastical Courts: their Past and Future, by S. T. TAYLOR-TASWELL, M.A. A short history of the origin of the ecclesiastical jurisdiction in England, with a descriptive enumeration of the several Courts and their jurisdictions.

Extradition and the Right of Asylum. ANONYMOUS. Some general remarks on extradition are followed by a caustic criticism of the attempt in Germany to found International Conventions for the purposes of extradition. Touching the right of asylum it is said, "It has certainly not the significance of that mediæval right, so valuable in its day, whereby a serf who fled to a *communa*, and lived there undisturbed by his lord for a year and a day, became a free man. All that we understand it to mean is that alien visitors are free to come and free to go; free to reside within the British dominions as long as they please, without any one saying them nay, provided they do not offend against the law of the land, to which they owe a temporary and local allegiance. Correlative with the duty of the resident alien to bear allegiance to our laws is the duty of our State to afford him protection in life, limb, liberty and property during the period of his residence among us. That, as we understand it, constitutes his asylum."

Southern Law Review.—April-May, 1881.

The Power of Usage and Custom to control or alter Rules of Law. II. By JOHN D. LAWSON. The discussion is continued as to the following heads:—(i) In the relation of principal and agent. (ii) In the law of Corporations. (iii.) In the law of Sales. (iv) In the law of Banks and Banking, and negotiable and assignable paper. The principles which the learned writer applies are the same as those discussed in a former paper reviewed by us at page 249 of this Journal. We there ventured the opinion that the change of custom or usage in trade is a *fact* in the contract, with reference to which the parties must be assumed to have dealt with each other. The law will therefore enforce or recognize the contract as it was *in fact* made. In the paper now under review, Mr. Lawson, while adhering to his original purpose, cites Tilghman, C.J., for the same proposition. "Now the jury have found that, in the ordinary course of business in this city, merchandise brokers made sale of the goods of the principal in the manner in which this coffee was sold. Therefore, when the plaintiff trusted a well-known merchandise-broker with the possession of his goods for the purposes of sale, he impliedly gave him power to sell in the manner in which he sold, or, to speak with more strict propriety (though the jury call it a sale), the manner in which he deposited for the purpose of sale." This seems to be a more satisfactory solution of the cases than engrafting upon the science of jurisprudence the proposition that absolute rules of law may in time succumb to, and be supplanted by, a custom to infringe them in a particular way. The rule that profits made by an agent out of the principal's business belong to the

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principal remains unimpaired. So, says the learned writer, does that rule which precludes an agent for sale from acting for the purchaser as well. We have lately had an instance of a qualification of this rule in *Culverwell* v. *Campton*, 31 C. P. 342, noted 1 C. L. T. Occ. N. 57, where it was held that if the seller knows of the receipt by his agent of a commission from the purchaser, and does not object thereto, he cannot afterwards claim it. Many other heads are discussed in a lengthy, interesting and valuable paper. In conclusion, the principle lying at the foundation of the cases is thus stated:—Usage and custom control the rules of law applicable to particular circumstances, provided it be known and understood by the parties, and be reasonable.

Breach of Promise, by JAMES SCHOULER. The foundation of the right of action is referred to, and the learned writer then divides his subject into the following heads:—Parties to the Action—What constitutes the Promise to Marry—Promise to Marry as affected by the Statute of Frauds—At what time the Promise may be regarded as broken—Rescission of a Contract to Marry—What promises are against public policy.

Married Women's Statutes—Wife's Real Estate, by THOMAS W. PEIRCE. The history of the so-called emancipation of the wife, commenced by Equity and carried on by Legislatures, is a familiar one. With reference to Statutes, Mr. Peirce says, "So far as they free the wife's property from liability to her husband's creditors and preserve it as a fund for the heirs, the statutes are remedial; but so far as they tend to deprive the husband of his curtesy, they are strictly construed." An examination of various Statutes then follows.

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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

County Court of Bruce.

RODY v. RODY.

Partition—Dowress—Right of, to ask partition—R. S. O. cap. 101.

A Dowress is not entitled to demand, though she is compellable to suffer, partition. R. S. O. cap. 101, sec. 49, s-s. 2, refers to the case of a married woman, who joins in a petition with her husband, who is entitled to demand partition.

A petition was filed by a widow, entitled to dower in the lands of her deceased husband, asking for partition of his lands. Her dower had not been assigned to her.

T. Dixon, for the petitioner, contended that she was entitled to the relief asked by virtue of the Partition Act. *A. Shaw*, for adult defendants, and *A. B. Klein*, for infant defendants, opposed the petition.

KINGSMILL, Co.J.—Originally at the Common Law a writ of partition did only lie for one or more parceners against the other or others. If one parcener made a lease for life, no writ of partition lies at Common Law; for she and her co-parcener do not then hold the freehold *in simul et pro indiviso*, according to the words of the writ; though if the lease be for years only, the writ lies, for the freehold then continues in parcenery.

Joint tenants and tenants in common became such by their own voluntary act and could not compel partition at Common Law. This was remedied by 31 Hy. VIII. cap. 1, as to joint tenants and tenants in common of estates of inheritance held in their own right or in that of their wives; afterwards the position of co-tenants of estates *not of inheritance* was ameliorated by 32 Hy. VIII. cap. 32.

Without legislative enactment, chancery as early as the reign of Elizabeth began to exercise jurisdiction in suits for partition; this jurisdic-

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tion was felt to be much better adapted to the adjustment of the rights of co-tenants, and it gradually grew into favour. The writ of partition as known to the Common Law fell into general disrepute and neglect, and was finally abolished by the Stat., 3 & 4 Wm. IV. cap. 27 sec. 36.

According to the weight of authority every co-tenant is entitled as a matter of right to demand a partition of the subject of the co-tenancy, and this right cannot be defeated by showing that a partition would be inconvenient, injurious, or even ruinous to the parties in interest.

In Ontario, R. S. O. cap. 101, being the Act respecting the partition and sale of real estate, by sec. 4 provides that all joint tenants, tenants in common and co-parceners, all dowresses and parties entitled to Dower, tenants by the curtesy, mortgagees and others having liens on, and all parties whosever interested in, to or out of any lands in Ontario may be compelled to make or suffer partition, or sale of the said lands or parts thereof as thereinafter mentioned and provided.

Sec. 8 enacts that "*any party interested* in any land in the Province, or the duly authorized agent of such party, or the guardian (duly appointed) of any infant entitled to the immediate possession *of any estate therein*, may file a petition in any of the Courts aforesaid, praying that partition, etc., etc."

Sec. 32 shows that a defendant may plead that the petitioner is not entitled to or in possession of the premises, or that the defendant did not hold the same together with the petitioners; and by that section it would appear that the Court or Judge is to finally determine any issues or questions raised by any party or parties interested.

Sec. 33 provides for issues of fact being tried by jury.

Sec. 49, s-s. 2, reads as follows:—"*When any married woman is a party to such proceedings as petitioner*, if her claim is an *inchoate* right of dower then in case of sale the Court shall determine the value of such right according to the principles applicable to life annuities, etc." This, I take it, must refer to cases where she is joining with her husband as a petitioner. The mere inchoate right of dower would not, I think, confer a right to compel partition.

By 42 Vict. cap. 22 sec. 6 this section is re-enacted with a further provision for payment of an annual sum, or such income or interest as is provided by sec. 5 of that Act.

Freeman on partition says, "Before proceeding to consider what subject of ownership may be divided by means of proceedings for compulsory partition, it is here necessary to remind the reader that partition is a division of the property among the co-tenants thereof, and therefore it is always indispensible that the subject of every compulsory partition should be held in co-tenancy, and to remember that several persons may own a thing without being co-tenants thereof; wherever this happens these persons are no more entitled to an action for partition than if they were owners of distinct pieces of property." And again, "If the property of a co-tenancy be a proper subject for compulsory partition, and if some or all of the estates held therein be estates of which the Court will take

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jurisdiction for the purpose of compelling an enjoyment in severalty, the next subject for enquiry is whether the person who proposes to file the bill of complaint for partition is in respect to his present interest in the property and to his present relations towards it, one of the persons authorized by law to demand its partition. An estate may be one of which Courts may take jurisdiction and compel a partition at the instance of some of the parties interested therein, and yet it may happen that the person desirous of procuring a partition, though a party interested in the property, is not one who may demand its partition."

The interest of one of the part owners may be such that he could be compelled to assent to a partition, but not such as to authorize him to demand one from the other part owners. It is a general rule prevailing in England without exception, and also throughout the majority of the United States that no person has the right to demand any Court to enforce a compulsory partition unless he has an estate in possession, one by virtue of which he is entitled to enjoy the present rent, or the possession of the property as one of the co-tenants thereof.

Freeman again says, "The object of the proceeding in a petition for partition was to turn an estate that is possessed in common into an estate in severalty, and not to furnish a mode of settling conflicting titles."

Some of the United States have statutes much like our Partition Act, and under them it has been held that a co-tenant, though disseised, may obtain compulsory partition; see *Barnard* v. *Pope* (*a*). The Act under which it was decided authorized "the application of *any person interested with others* in any lot tract of land or other real estate."

If the party seeking partition have an estate in the property held by him in co-tenancy with others, and such estate entitle him to apply for partition, it is next necessary to enquire concerning his relation to the property in respect to the possession thereof.

Proceedings for partition were not designed as an alternative remedy with the action of ejectment. It was always necessary at Common Law that the applicant for partition be actually or constructively in possession of the real property sought to be divided. In partition the plaintiff or petitioner must allege that he is seised, which imputes a present possession as tenant in common or co-parcener. A widow entitled to dower did not at Common Law have any estate in the lands until assignment. She was not entitled to joint possession with the heirs, therefore she was not a tenant in common. But where the Common Law has been succeeded by statutory enactment or by judicial construction, under which the widow at the death of her husband has the right to the possession of one-third of his real estate, then she is tenant in common with the heirs. In such case her right of entry does not depend upon the assignment of dower which is a mere severance of the common estate. With us by *Allen* v. *The Edinburgh Life Assurance Company* (*b*), it appears that till assignment the widow

(*a*) 14 Mass. 436.

(*b*) 25 Gr. 306.

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has no estate in the land; see *Brown* v. *Meredith* (*c*). The vesting of the estate is suspended till assignment.

Freeman, sec. 458, draws this distinction: A tenant by the curtesy, as he has a life estate in the lands of his deceased wife, is, when such lands are held in co-tenancy clearly entitled to a partition thereof. A tenant in dower, because she is not a co-tenant, has not right to demand partition of the property, to which her dower interest has attached.

A widow entitled to dower is not regarded as a co-tenant. When her inchoate right of dower attached anterior to the existence of the co-tenancy, it cannot, in absence of statutory provisions to the contrary, be affected by proceedings in partition. Her interest is not that of a co-tenant, nor is it in any respect dependent on the interest of a co-tenant. It is paramount to the co-tenancy, and she may have it assigned irrespective of any voluntary or compulsory division among other co-tenants. The same reason which before the assignment of dower exempts a widow from the operation of the law of compulsory partition operates with equal force after such assignment has been made. Notwithstanding the assignment vests in her a present estate, it does not make her a co-tenant with the heirs of her husband. When an inchoate right of dower attached to a moiety instead of an estate in severalty it is not paramount to the co-tenancy; it was therefore always subjected to either a voluntary or compulsory partition, whereby it is removed from the whole tract and attached to the property assigned in severalty to the husband.

I do not think it reasonable to come to the conclusion that our Statute confers upon a dowress the right to become a petitioner under the Partition Act. Such is far in excess, as we have seen, of any right which as such she had under the general law in England, providing for partition whether at Common Law or in equity.

A widow entitled to dower is not regarded as a co-tenant and originally a judgment in partition could only affect her right, if she had any as a joint tenant, tenant in common or in co-parcenery. Under our Statute this, as pointed out, is changed, and she is compellable to suffer partition, but I think she has not the power of compelling others. She can in the usual way get her full right by proceedings under which her dower would be assigned, and I do not think the Legislature intended to confer on her the power to enforce by proceedings in partition a payment of a gross sum in lieu of dower, which, if found to be to the interest of other parties interested, she might be compelled to accept. I find no case reported where a dowress was petitioner, and now that the right is questioned I am loth in absence of authority to give so liberal a construction to the Statute, opposed as it appears to be to the principles on which partition is granted.

It further appearing that a right to dower is denied, that the will of the deceased is sought to be contested, and that it is claimed that in lieu of dower the petitioner has accepted a provision made for her under the will, I am of the opinion that, under the authority of *Bennetto* v. *Bennetto* (*d*),

(*c*) 2 Keen. 527; *Bell* on Property of husband and wife, 292.
(*d*) 6 Pr. R. 145.

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I should not here have allowed this petition. Blake, V.C., says, "I do not think this is a case for the operation of the Partition Act. That Act is only intended to apply to simple cases where some common title in the petitioner and respondents is admitted. And the only question is the extent of the interest of the various parties. The object of an application for the allowance of a petition is to require the petitioner to show that he was entitled to partition before the case was referred to the Master to ascertain the amount of his share." I think now that I should, upon the application for the allowance of the petition, have considered at least some of the objections now raised by the pleadings. Mr. Shaw urged them and was prepared to argue them then, and had I remembered that by section 29 the petition could be at once registered in the County Registry Office I should certainly have disposed of them before allowing the petition. For the reasons given I think that my better course will now be to direct that an order of this Court do now issue rescinding the order allowing the petition, with costs to defendants up to and inclusive only of attendance upon the notice for the allowance of the petition.

(Reported by A. B. Klein, Esq., Barrister-at-Law.)

NEW BRUNSWICK

In the Supreme Court.

(Reported by WM. PUGSLEY, JR., *and* GEO. W. BURBIDGE, ESQS., *Barristers-at-Law.)*

[FEBRUARY, 1881.

Ex parte OWEN.

[Full Court, before ALLEN, C.J., and WELDON, WETMORE and DUFF, JJ.]

Dominion official—Income—Whether subject to taxation for municipal purposes.

Held, by Weldon, Wetmore and Duff, JJ., (Allen, C.J., *dubitante*), that the income of an officer in the Customs, who resided in the city of Saint John, was not subject to taxation for municipal purposes.

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THE QUEEN v. MULHOLLAND.

[Full Court, before ALLEN, C.J., and WELDON, WETMORE, DUFF and KING, JJ.]

Criminal law—Indictment for murder—In short form—Whether prisoner can be convicted of assault under.

Held, by Weldon, Wetmore and King, JJ., (Allen, C.J., and Duff, J., dissenting), that on an indictment for murder in the short form given in Schedule A. to cap. 29 of 32-33 Vict., a prisoner cannot be convicted of an assault under sec. 51 of that chapter.

Held, also, by all the Judges, that the fact of the prisoner's counsel having at the trial contended that he could be so convicted, and requesting the Judge so to direct the jury, did not preclude him from afterwards objecting to the validity of the conviction on this ground.

[APRIL, 1881.

RANDOLPH v. TAYLOR, *et al.*

[Full Court, before WELDON, WETMORE, DUFF, PALMER and KING, JJ.]

Practice—Judgment as in case of non-suit—When defendant may move for.

Defendant having moved for judgment as in case of non-suit, after plaintiff had, after issue joined, allowed two terms and one Circuit Court at which the cause might have been tried to elapse, without proceeding to trial,

Held, by Weldon, Wetmore, Duff and King, JJ., (Palmer, J., dissenting), that the rule of practice of the Court, as settled by *Oliver* v. *Campbell*, is that it is not sufficient that two terms and one circuit, at which the plaintiff might have proceeded to trial, should have elapsed, but that two circuits, at either of which the plaintiff might have proceeded to trial, must have passed before the plaintiff can be held to be in default, and the defendant entitled to judgment as in case of non-suit.

SINCLAIR v. SINCLAIR, *et al.*

[Full Court, before WELDON, WETMORE and KING, JJ.]

Costs—Attachment for—Delay in applying for attachment—Costs taxed on day other than that appointed for taxation—Irregularity—When Court will not grant attachment.

Where, as appeared by the clerk's allocatur, costs were taxed on a day later than that named in the clerk's appointment for taxation, and no explanation of the irregularity was offered, the Court refused an attachment for contempt in not paying the costs so taxed.

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In Hilary Term the plaintiff applied for an attachment for non-payment of costs taxed on a rule of Court of the preceding term. The application was withdrawn, it being doubtful whether the allocatur, which was in the clerk's hand-writing, expressed the amount to be $77.70 or $27.70. The application was renewed in Easter Term.

Held, per Wetmore, J., that the second application was too late; but, per King, J., that neither the lapse of a term, nor the absence of an affidavit accounting for the delay was an objection to the application, as the facts were within the knowledge of the Court, and the delay was not caused by the fault of the plaintiff.

Held, per Weldon, J., that as the application was against one of two defendants, and no reason was shewn why a demand for payment was not made on the other defendant, the attachment ought not to be granted.

McRORY v. McALPINE.

[1st Division, before ALLEN, C.J., and DUFF and PALMER, JJ.]

Bail—Relief of—In action in the County Court—Consol. Stat. c. 37, s. 31, c. 38, s. 5 and c. 51, s. 30, considered—Necessity of issuing ca. sa. to fix bail—Appeal from order of County Court Judge relieving bail.

A Judge of the County Court has no power to relieve bail who render their principal after the expiration of thirty days after service upon them of the writ in the action on the bond.

Semble, It is not necessary under the present practice to issue a *ca. sa.* to fix bail in the County Court.

Semble, An appeal lies to this Court from an order of a Judge of a County Court relieving bail.

Ex parte LEMON.

[1st Division, before ALLEN, C.J., and DUFF and PALMER, JJ.]

Portland Town Council—Power of, to regulate hackney coaches, etc., under 34 Vict., c. 11, s. 57, sub-section 45—By-law requiring hackmen to take out license valid—That hackmen have license from City Council of Saint John makes no difference.

By 34 Vict., c. 11, s. 57, sub-section 45, the Town Council of Portland has power to regulate and license hackney coaches, cabs, omnibuses and public sleighs, to establish fees on such licenses and the fare to be taken within the Town of Portland, or for any distance beyond and from the said town; and to make by-law for that purpose. Under the authority of this section the Town Council made a by-law that no person should keep set up, use or drive in the town any hackney coach for the conveyance of persons for hire without having obtained from the Town Council a license for such hackney coach, etc., under penalty of ten dollars. L., a licensed

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hackman of the City of Saint John, which city adjoins the town, drove a passenger from the city into the town without having a license from the Town Council. Being convicted of the offence against the by-law, L brought the matter before the Court.

Held, that the by-law was valid, and that L. was rightly convicted.

ADAMS, *et al.*, v. THE NATIONAL INSURANCE COMPANY.

[2nd Division, before WELDON, FISHER AND WETMORE, JJ.]

Fire Insurance—Amount of claim to be fixed by an award—Condition precedent—Total loss.

The plaintiffs effected with the defendants an insurance against loss by fire on their stock of dry goods. The stock was totally destroyed by the fire of June, 1877. The policy contained, among others, the following provisoes: 1st. That in case of damage to personal property, the amount of damage should be determined by appraisal by competent parties, to be mutually appointed by the assured and the company. 2nd. That in case of any difference arising touching any loss or damage, the same should, at the written request of either party, be submitted to impartial arbitrators. 3. That defendants should not be sued for any claim until after an award fixing the amount of the claim in the manner above prescribed. In an action on the policy for a total loss, the defendants pleaded that the action was commenced before any award had been obtained fixing the amount of claim. The plaintiffs replied—1st. That the defendants did not make any written request to submit any difference between them to arbitration. 2nd. That the plaintiffs before the commencement of the suit requested the defendants to submit the differences between them to arbitration, and they neglected and refused to do so.

Held, on demurrer to the replications, per Weldon, J., 1st. That the covenant that the amount of the claim should be fixed by arbitration did not apply when the claim was for a total loss. 2nd. That the covenant was collateral, and was not a condition precedent to plaintiffs' right of action.

Per Wetmore, J. That the covenant was a condition precedent and would have to be performed before plaintiffs would have any right of action, and the fact that defendants refused to appoint an arbitrator would not relieve them from performance.

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NOVA SCOTIA.

In the Supreme Court.

[8TH JANUARY, 1881.

GUILFORD v. ANGLO-FRENCH STEAMSHIP COMPANY.

Master of ship—Wrongful dismissal.

Plaintiff, in 1874, agreed with a number of Halifax merchants to subscribe $4,000 towards a steamship enterprise and assist in getting a suitable ship, provided he should be master. This was agreed to, and the wages were fixed at $1,200. The company was incorporated in 1875 by Act of the Dominion Parliament, and the plaintiff received stock to the amount of his contributions. After running for some time it was found that the enterprise was sinking money rapidly, and in 1876 a new arrangement was entered into by which the plaintiff was to supply the ship with men and provisions for the passengers and crew, and sail her as commander for $900 a month, afterwards increased to $950. The ship had been originally accustomed to remain at St. Pierre forty-eight hours, but the time was afterwards lengthened to sixty hours by the company, yet the plaintiff insisted on remaining only forty-eight hours against the express directions of the company's agents at St. Pierre, and was otherwise disobedient to the agents and treated them with gross insolence, in consequence of which he was dismissed from the service of the company.

Held, that the dismissal was justifiable, that the plaintiff was not a part owner of the ship and could not exercise, independently of the corporation, any power whatever over the property of the company, having no interest whatever in the ship, but only in the stock of the company, and the case must therefore be considered as the ordinary case of a master dismissed for cause by the owners.

Sir W. Young, C.J., dissented, holding that, while the plaintiff would have had no redress had he been in the ordinary position of a ship-master dismissed by a majority of the owners, his position was that of a part owner, and he was entitled to compensation.

ROSS v. HUNTER.

Registration—Notice.

Plaintiff purchased in 1872 a property adjoining defendant's property and to the north of it. In 1859, Caldwell, who then owned the northern property, granted by deed to defendant the privilege of piercing the south wall of his building, carrying his stove pipes into the flues, and erecting a wall above the south wall of the building to form at that height the north

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wall of defendant's building, which was higher than plaintiff's. This deed was not recorded until 1871, and plaintiff's solicitor, in searching the title, did not search under Caldwell's name after the registry of the deed by which the title passed out of Caldwell in 1862, and did not, therefore, observe the deed creating the easement in favor of defendant. Defendant's northern window was so close to plaintiff's wall that it was plain to one narrowly observing it that defendant had no separate northern wall, and the defendant's northern wall above plaintiff's building, resting upon plaintiff's southern wall, was obvious to any one looking from the opposite side of the street.

Held, that the deed creating the easement came within the Registry Act as "affecting lands," and would have been void as against subsequent purchasers for valuable consideration without registry, but that plaintiff, however, was not bound by the registry of it in 1871 although previous to his purchase, the title having passed out of Caldwell in 1862, but that plaintiff must be held to have had notice of the easement as the encroachments were plainly visible.

In re WALLACE RICE.

Larceny—Sentence of one year to Penitentiary—Commitment to Gaol.

A prisoner was convicted of larceny and sentenced to one year's imprisonment in Dorchester Penitentiary. The warder refused to receive him on the ground that the shortest period for which prisoners could be sentenced to, or received at, the penitentiary was two years. Prisoner was then taken to the county gaol. On a motion for Habeas Corpus, the gaoler, in his return, set out the conviction for larceny, and also returned that the prisoner was detained under a warrant of a Justice for attempting to escape by tearing up the floor of his cell. The warrant annexed to the return was under the hand of the Justice. The Court refused to discharge him and ordered that he should be sentenced to imprisonment in the common gaol for one year, inclusive of the period for which he had already been detained.

In re CONNOLLY.

Probate—Solemn form—Consent—Appeal—Costs.

A will having been produced for probate in common form, probate was refused on account of defects on the face of it, and thereupon the counsel present consented to proceed with an investigation to test the will in solemn form without the usual citations and other preliminaries according to the practice of the Court. The Judge of Probate decreed the will to be invalid. A pecuniary legatee under the will, who had not been a party to the consent, was one of the appellants from this decree.

Held, that the appeal must be allowed, but without costs, as there had been a consent to the proceedings below by all the counsel that had

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appeared at the bar of this Court, who were the same proctors and advocates that had appeared below.

SOUTHER v. WALLACE.

Amendment of Pleadings after Appeal.

Pleas were added by defendant just as the cause was going to trial in 1876, to which plaintiff, therefore, had no opportunity to reply. The verdict was for plaintiff, and a rule to set it aside was discharged in 1877. An appeal was taken to the Supreme Court of Canada, the result of which was that a new trial was granted in 1878, on the ground of improper rejection of evidence and misdirection. After this decision was given plaintiff obtained an order absolute in the first instance for leave to amend his declaration and reply and demur to the added plea, on payment of costs if any. Defendant asked for a rule to rescind this rule on the ground among others, that the application was too late, that it should have been a rule *nisi* in the first instance, and that the amount of the costs should have been settled in the rule. The rule to rescind was refused, and the appeal from such refusal dismissed with costs.

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THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

In Chancery.

[FERGUSON, V.C., 2ND SEPTEMBER, 1881.

TAYLOR v. HALL.

Injunction—Untaxed costs of former motion—Amendments—Service of notice containing—Sufficiency of.

A motion by the plaintiff to continue an *ex parte* injunction was refused with costs, but at the same time leave was given to apply on the return of the motion to amend the bill, and a new injunction was granted *ex parte*. On the return of the motion to continue the latter, it was objected that the costs of the former motion had not been paid. Counsel for the plaintiff expressed willingness that they should be paid, but contended that as they had not been taxed the objection should not prevail.

Held, that the non-payment before taxation was no objection to the motion.

The proposed amendments to the bill were set out substantially in the order for the injunction, which was served.

Held, that, as the defendant had thereby notice of the proposed amendments, the objection that the amended bill was not served was not entitled to prevail.

Where there appeared to be a substantial matter to be tried and no irreparable injury would be done by preserving the subject matter of the suit *in medio*, the injunction restraining the defendant from dealing with it was continued to the hearing.

J. H. McDonald, for plaintiff.

A. Hoskin, Q.C., for defendant.

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HAYES v. HAYES.

Appeal from Master—Trustee and cestui que trust—Just allowances—Special findings—Power and duty of Master as to—Tender of evidence.

The defendant, being the assignee of a policy of assurance on his brother's life in trust to pay himself certain moneys and expend the residue upon the support and maintenance of the assured's family, and having made further large advances to his brother in his lifetime, took a second assignment of the policy, absolute in form, on the advice of his brother who was an attorney. On the death of the latter the defendant, claiming to receive payment of the policy, went to Hartford to hasten payment, pending a dispute with the plaintiffs the family of the assured, as to the right to receive the proceeds. In taking the accounts between the parties, the Master found that the defendant acted *bona fide* in so doing and allowed him his expenses as a just allowance to a trustee, though the company, at the request of the plaintiffs, refused to pay him, and sent the proceeds to their solicitors in Toronto to be paid to the party entitled.

Held, on appeal from the Master, affirming his ruling, that as the defendant was under either of the assignments, as trustee or individually, entitled to the possession of the fund, and as the Master, under all the circumstances, thought fit to allow the expenses, and it did not appear to the Court that he was wrong, the item should be allowed.

Held, also, that the Master had properly allowed to the defendant in his account a fee of $10, paid by him to Counsel for advice as to his action in respect of the two assignments.

The Master, at the request of the defendant, reported specially in his favour as to many matters not particularly referred to him, but which formed the subject of charges of fraud made in the bill of complaint against the defendant. On appeal the appellants contended that the Master had exceeded his powers, and that the effect of his special findings would be to prejudice the plaintiffs as to costs at the hearing on Further Directions.

Held, that the Master had power to report specially any matters he deemed proper for the information of the Court; and that it was the duty of the Master so to report any matter bearing on the question of costs.

When the case was before the Master, the plaintiffs offered to put in as evidence some letters then produced, but not identified; objection being taken that the letters referred to a branch of the case which had been disposed of at the hearing, the Master ruled against the admission of such evidence. No tender of any particular class or character of evidence was made, the letters being simply offered.

Held, that as there was nothing to show that a tender of evidence of a certain character was made, nor to show upon this appeal what the rejected evidence was, the appellants were not entitled to a reference back to admit the letters.

Donovan, for the appeal.

E. Douglas Armour, contra.

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LIVINGSTONE v. WOOD.

Judgment—Amending decree to conform to—Costs.

A decree, which declared an assignment of a bond to have been a security only and not absolute, contained a declaration that certain credits were due to the plaintiff, and referred it to the Master to take the accounts. In his office the defendant was hampered by this declaration in the decree, the Master holding that he was bound by it.

On petition to amend the decree so as to make it conform to the judgment,

Held, that, upon a consideration of the judgment, which was directed solely to the fact that the bond was assigned as a security only, it appeared that the view taken as to the credits was a ground for the holding as to the assignment of the bond and was not a substantive part of the judgment, and the declaration in the decree as to the credits was therefore unauthorized.

Hoyles and *Gwyn*, for the petition.

W. Cassels, contra.

DICKSON v. HUNTER.

Mortgagor and Mortgagee—Fixtures.

The plaintiffs were registered mortgagees of a large tract of land. M., desiring to build a mill in a village where part of the land lay, took a deed of a small portion thereof from one of the owners of the equity of redemption, conditioned that he should erect a flouring-mill thereon. M., without searching the title and without actual notice of the plaintiffs' mortgage, erected the mill, with the intention of establishing a business there. Before its completion and before the machinery was put in, he discovered the mortgage, but proceeded to put in a boiler, engine, mill stones and several machines necessary for carrying on milling. On the plaintiffs' attempting to sell under their mortgage the machinery was removed by M. An injunction was granted to stay the removal, and an issue was directed to try the title to the mill and machinery. A number of the machines were not attached to the building, but were kept in place by their own weight; but they were necessary for the working of the mill, and suited for that purpose only; and the whole structure—building, engine-house, boiler, engine, and machinery—were put up with the express purpose of establishing a flouring-mill on land that M. believed to be his own.

Held, that the mill and its contents passed to the mortgagees; and an order was made for restitution of the machinery which had been removed,

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and the injunction granted to prevent its removal in future, with liberty to M. to pay the value thereof to the plaintiffs, which they should accept if offered, and release the machinery.

Moss, for plaintiffs.

W. Caisels, contra.

BEATY v. SAMUEL.

Trust for creditors—Secured creditor—Rights of—Creditor not scheduled under Insolvent Act, 1875.

The plaintiff, holding a chattel mortgage with a covenant for payment of the debt and interest, was not scheduled in proceedings in Insolvency under the Act of 1875, but he was aware of the proceedings, and the Insolvent obtained a discharge under the Act.

Held, that the debt under the chattel mortgage was not extinguished.

A subsequent Common Law assignment for the benefit of creditors was made by the debtor of all his property to the defendant in trust to pay expenses, etc., and "to apply the balance in or towards payment of the debts of the assignor, in proportion to the respective amounts without preference or priority."

Held, that the plaintiff was entitled to sue for his whole debt and therefore to share in the estate under the deed proportionately for the whole, and that he was not bound to value his security and rank for the balance only.

Beaty, Q.C., for plaintiff.

Thomson, for defendant.

TURNER v. SMITH.

Demurrer—Married woman—Separate estate—Lien.

A married woman, entitled under a will to certain moneys charged upon the testator's estate, procured the present value thereof and released the estate, pending this suit against her as endorser of a promissory note. The money was paid by the cheque of the solicitors for the estate, which was immediately presented to the Bank of Commerce, accepted by them,

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endorsed by the married woman, and placed in the hands of B. to abide the result of the suit. By amendment, the bank and B. were made defendants; and the bill alleged as a conclusion of law that the plaintiff had a lien on the cheque for his debt, and prayed for an endorsement of it to him by B., and that the bank should be ordered to pay it.

Held, that, as against the defendants, the bank and B., there was no equity; for, before judgment and execution, a creditor has no lien or charge upon the separate estate of a married woman nor any right or equity to control it, and a demurrer by the bank and B. was allowed.

Muir, for the demurrer.

W. Cassels, contra.

DUMBLE v. THE COBOURG, &c. RAILWAY CO.

Opening up Proceedings—Railway Company—Award—Payment—Recovery of portion of money paid.

A party desiring to open up proceedings by way of review for the admission of newly discovered evidence must show, (i) That the proposed evidence would probably have affected the result if it had been given at the proper time. (ii) That at the time it might have been used neither he nor his agents had knowledge of it. (iii) That it could not have been discovered in time with reasonable diligence.

A railway company in constructing their line took possession of a piece of the plaintiff's land and under a decree in a proceeding against them paid therefor $1,800. A rival company were projecting their line and the defendants paid the money to secure the land. They subsequently applied for a refund of a portion of the money on the ground that another company whose rights had been assigned to them had theretofore paid a prior owner of the land for a portion of that bought by the defendants.

Held, that they could not recover; as, by exercising due diligence, they might have become acquainted with the fact of the prior purchase and payment.

G. H. Watson, for plaintiff.

H. Cameron, Q.C., and *Moss*, Q.C., for defendants.

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Chancery Chambers.

[FERGUSON, V.C., 2ND SEPTEMBER, 1881.

KING v. DUNCAN.

Money paid into Court—Retention of pending appeal.

Where money is paid into Court for a specific purpose, the party paying it in is entitled to withdraw it when that purpose has been answered in his favour.

The bill was filed for an injunction to restrain the defendant from receiving the proceeds of a judgment and execution against his co-defendant alleged to be fraudulent. The money was directed to be paid into Court, "to abide the further order of the Court." The injunction was refused, and the plaintiff gave notice of appeal to the Court of Appeal, and applied for an order to retain the money in Court pending the appeal.

Held, on appeal from the Referee, reversing his order, that the money had not been paid into Court for any specific purpose, but to abide the further order of the Court; that it represented the subject matter of the suit; that it was in the discretion of the Court to act in the premises; and that the money should remain in Court pending the appeal, unless security were given instead.

Thomson, for the appeal.

Hoyles, contra.

PETRIE v. GUELPH LUMBER COMPANY.

Undertaking to speed cause—Dismissal of bill—Relief from undertaking.

The plaintiff undertook upon a motion to dismiss his bill, to bring the cause down to the then next sittings at Guelph. From some correspondence it appeared that if the plaintiff had set his cause down for the then next Guelph sittings, a postponement would have been asked for on the ground of the attendance at the House of Commons of a defendant who was a member. The plaintiff had offered to bring the cause down to the then next sittings at Toronto to which a conditional consent was given, but the cause was not set down. The Referee dismissed the bill.

Held, on appeal, reversing the Referee's decision, that the plaintiff was relieved from his undertaking to bring the cause down to Guelph under the circumstances, and that he was under no obligation to bring the cause

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down to Toronto; and as no intentional delay was shown on the part of the plaintiff the bill was restored.

McCarthy, Q.C., for the appeal.

S. H. Blake, Q.C., and *W. Cassels; Bethune, Q.C.*, and *Hoyles*, for the several defendants.

Common Law Chambers.

OSLER, J., 5TH AUGUST, 1881.

In re KINSEY v. ROCHE.

Division Court—Prohibition—Surety—Division Courts Act, 1880.

Plaintiff and defendant were joint makers of a note for $169, which the plaintiff had signed as a surety only, and upon which he paid $118.

Held, that the plaintiff could not maintain an action in a Division Court for the amount so paid, and that a prohibition should issue, but without costs, as there was no meritorious defence.

Munson *(Watson & Doherty)*, for summons.

Culham, *(Bethune & Co.)*, contra.

[26TH AUGUST, 1881.

GRIERSON v. CORBETT.

Bail—Ca. re. to fix Bail—Surrender—Bail piece, copy of.

Where a defendant is arrested by a sheriff under a *ca. re.*, and after verdict is surrendered by his bail to the same sheriff upon an action being commenced against them, the sheriff is not entitled to a copy of the bail piece before receiving the prisoner into custody, and where such refusal was given, the sheriff was compelled to pay the costs of an application to stay proceedings, and an order was given to extend the time of surrender.

Aylesworth for the bail.

Porteous *(Robinson, O'Brien & Scott)*, contra.

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[WILSON, C.J.

In re JOHNSON AND THE TORONTO GREY AND BRUCE RAILWAY COMPANY.

Mandamus—Railway Bonds—Registration of.

The Canadian Bank of Commerce received from various parties, bonds of the Toronto Grey and Bruce Railway to the amount of £106,800, and tendered them for registration at the railway office in order that the holders might vote thereon. The Secretary of the Railway Company refused to register the bonds unless written transfers from the holders were produced.

Held, that the Company should register the bonds without the production of the transfers, and the summons for a *mandamus* was made absolute with costs.

McCarthy, *Q.C.*, and *E. Martin*, *Q.C.*, for the summons.

S. H. Blake, *Q.C.*, contra.

High Court of Justice.

IN CHAMBERS.

[OFFICIAL REFEREE, 5TH SEPTEMBER, 1881.

In re SOLICITORS.

Taxation—Solicitor and Client—Form of Order—O. J. A., O. L., R. 16.

An order for taxation of a solicitor's bill was granted, more than a month having elapsed since the delivery of the bill.

It was directed that the order should issue in the long form in use before the O. J. Act; for the word "Master" in O. L., R. 16, should read "Taxing Officer," as plainly appears from R. 11 of the same order; and by using the form number 136 it might be contended that the reference was made to the Master in Chambers, by the effect of R. 17 of O. L.

H. Cassels for the motion.

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In re LAWS, LAWS v. LAWS.

Notice of appeal.

The notice of appeal required by R. S. O. cap. 38, sec. 36 (O. J. Act, 1881, sec. 38), was duly served upon the respondents' solicitors, and they always supposed the judgment to be subject to appeal. But, by an oversight of the clerk of the appellants' solicitors, the notice was not delivered in time to the registrar of the Court appealed from.

Held, that this was a proper case in which to exercise the discretion given by the statute, and the notice was allowed to be filed within four days on payment of the costs of the application.

F. Beverley Robertson, for the motion.

Delamere, contra.

[12TH SEPTEMBER.

WEATHERHEAD v. WEATHERHEAD.

Service—Infant out of Jurisdiction—O. VI., *R.* 3.

In a partition suit an application was made for an order allowing substituted service upon the official guardian for an infant defendant. The infant was resident without the jurisdiction of the Court and no provision is made for such a case under O. VI., R. 3.

Order made on the ground that the share of the infant in the lands in question amounted to only $40.00 and substituted service would save expense.

W. Roaf, for the application.

[MASTER IN CHAMBERS, 10TH SEPTEMBER.

O'REILLY v. MOORE.

Notice of Motion—Sufficiency of—Setting aside irregular proceeding.

A notice of motion to set aside proceedings for irregularity, must specify on its face the alleged irregularities.

Fullerton, for the motion.

G. H. Watson, contra.

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NOVA SCOTIA.

In the Supreme Court.

(Before the Court in Banc.)

[JANUARY, 1881.

McKAY v. BONNETT.

Representation—Estoppel.

One Nicholson being indebted to plaintiff, gave him a horse, to be sold towards the satisfaction of the debt. Plaintiff exchanged the horse with one Hardwick for a colt, informed Nicholson of the trade, fixed the value of the colt at $5.40 more than the debt, and paid this amount to a creditor of Nicholson in final settlement. Hardwick afterwards became dissatisfied with the exchange, insisted upon plaintiff giving back the colt and applied to M., an attorney, who wrote plaintiff. Plaintiff called on the attorney and, according to the evidence of the attorney, declared to him that the horse was Nicholson's, according to plaintiff's evidence, not contradicted, he stated to him the arrangement between himself and Nicholson in reference to the horse, (as above set out). On the same day, and previous to the interview, M., acting as attorney of other parties, had entered up a judgment against Nicholson, and the Judge of the County Court found that the attorney had, on the faith of plaintiff's statement that that the horse was not his but Nicholson's, caused the defendant, the sheriff, to levy on it in plaintiff's possession and that plaintiff had abstained from looking after other property of Nicholson, who was a mere transient employee. Before any expense had been incurred in keeping the horse, and before the sale, the plaintiff notified the sheriff that the horse was his.

Held, in accordance with the previous ruling of the Court, 3 R. & C. 137, that the plaintiff was not estopped from setting up his ownership of the horse.

Per Weatherbe, J., that the representation was not made with the intention that the execution creditor or the sheriff should act on it by seizing the horse, and it could not be reasonably inferred that such was the intention; and, further, that the assertion of plaintiff had not been made baldly but with a qualification explanatory of the arrangement above referred to, from which it seemed reasonable that the attorney had acted rather on the belief that the horse could be shown to be Nicholson's, than upon the mere assertion of plaintiff that it was so.

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DOYLE V. LALLANT.

Certiorari—Setting Aside.

A motion was made to set aside a *certiorari* taken out in a summary cause tried in the County Court, the ground for the *certiorari* being that the Judge had refused to take down certain evidence. The court refused to amend the remarks of the County Court Judge, but, as to the *certiorari*, held that it was safer and better that the rule to set it aside should include a motion to set aside the order for the *certiorari*, as well as the *certiorari* itself. With the consent of the parties the rule to set aside the *certiorari* was discharged without costs.

WINCHESTER V. ROBLEE.

Appeal Papers—Rule for Appeal—Certificate.

Appeal papers sent back to the Judge of the County Court in order to have the certificate amended by including the rule for appeal among the papers certified, the rule not having been certified bo the Judge.

Per Weatherbe, J. The papers are already sufficiently certified.

PICTOU BANK v. FRASER.

Insolvency—Proveable Claim.

Defendant and his co-partner became insolvent and plaintiffs filed a claim against the partnership estate for the notes declared on made by the partnership and endorsed by defendant, without disclosing the security of defendant as endorser or their attempting to rank on the individual estate. Defendant obtained the required signatures to a deed of composition and discharge, and very shortly before he applied for its confirmation, plaintiffs attempted to amend their affidavit of claim against the partnership so as to disclose the security, but the affidavit was not resworn. At the same time a claim was filed against the individual estate. Defendant, by his deed covenanted in consideration of the discharge to pay a composition and give to each of his creditors his promissory notes, secured by names approved of by the inspectors, but did not include plaintiffs' claim in his schedule, or make or deliver any notes to them.

Held, that the claim was a claim "provable against" defendant's individual estate within the meaning of the Act, although the right to prove had been lost by the failure to disclose, but that the plaintiffs' claim was

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not discharged, defendant having refused to make or to deliver to them the notes, and having treated plaintiffs as if they had no valid claim against the estate.

James, J. (dissenting), held that the discharge was not conditional on the notes being given but absolute, and that it bound the plaintiffs.

CREIGHTON, ASSIGNEE v. CHITTICK *et al.*

Insolvent Act of 1875—*Trader.*

An action of trespass was brought by plaintiff as assignee of T. P. Fairbanks, under the Insolvent Act of 1875. Defendant pleaded, denying plaintiff's possession and title, and denying that the plaintiff was assignee as alleged. It appeared that the business of the insolvent had reference only to the canal property of which he had been the owner, and although on cross-examination the plaintiff stated that Fairbanks had bought or sold all sorts of things and had bought oats, wood and iron, he added that there were no assets of that kind, that Fairbanks had handed him no books of account, books of business or cash book, and that his books had reference wholly to the canal property.

Held, that Fairbanks was not a trader within the meaning of the Insolvent Act, and Creighton was not his lawful assignee, and therefore had no title to the land; that this defence had been sufficiently pleaded, and that section 144 of the Insolvent Act making the assignment *prima facie* evidence of the regularity of all proceedings did not apply, as the question was directed not to the regularity of the proceedings, but to the substance of the assignment.

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THE

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ON THE LEGAL DEGREES OF MARRIAGE IN CANADA.

II.

IN our last paper on this subject we gave a sketch of the marriage law of England down to the date of the acquisition of Canada as a colony. In the course of our enquiry we found two distinct sets of legal principles applicable to the questions that might arise concerning the validity of marriages, administered by two separate and distinct jurisdictions. There was a law affecting the ceremony of marriage, or the formalities attendant upon the solemnization thereof, upon observance of which a *de facto* marriage was created. There was a jurisdiction entertaining questions arising in respect thereof, and becoming *functus officio* upon receiving proof of the observance of the formal requisites. Every *de facto* marriage was a valid and legal one under this jurisdiction—valid, as complying with the Common Law, and legal, as distinguished from canonical. We shall follow this law and this jurisdiction into Upper Canada. There was a law affecting incidental marital rights, and the property and contracts of a man and woman occupying towards each other the *de facto* relationship of husband and wife. This belongs rather to the general law of property and contracts than to the law of marriage, and is important only in considering what part of the whole law affecting husband and wife may have been imported into, or adopted by, a

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colony. We shall touch incidentally upon this law in the following pages. And, lastly, there was a law touching the essentials of marriage, affecting the very foundation of the *status* but, strange to say, deriving vitality only from motion communicated to it by the proper jurisdiction—lying dormant until called into active life by the ecclesiastical judges—occupying a substratum in English jurisprudence, buried there by the whole Parliament, until unearthed by the Courts Christian—operating from and upon execution only. It was, in fact, ignored by the Common Law and by the Civil Judges; its infringements, before execution from the Courts Christian, were declared by the Temporal Courts not to be illegal. They looked not upon incestuous alliances as a sin; they ignored the canons of the Church until they became statute law. But the Ecclesiastics might punish the incest and separate the parties in their life time; and they grounded their jurisdiction upon their duty to care for the souls of the delinquents. This, in a country whose whole constitutional history is interwoven with matters ecclesiastical; where, from time immemorial, the Bishops have discharged judicial functions; where, at a famous time in its history, the ecclesiastical jurisdiction was separated from the civil, and directed to act in a circumscribed area; in a land with a State religion, with an established Church, with the dignitaries of the Church sitting in the Parliament by virtue of their high office, making the laws of the realm. In contrast with this, we are to consider the laws of marriage in a colony which, when it was almost in a state of nature, received from a country which, through centuries of refining, had produced a code of law suited to its requirements, such parts of that law as were applicable to the small band of settlers who peopled the colony—a land where religion is not a State matter, where all churches, religious bodies and sects, stand upon an equal footing (*a*) as voluntary associations (*b*), where there are no spiritual judges to administer rebukes to, and impose penalties upon, offenders

(*a*) C. S. C. cap. 74.

(*b*) *Dunnett* v. *Forneri*, 25 Gr. 199; *In re Bishop of Natal*, 3 Moore P.C., N. S. at p. 148.

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against the Levitical Law, where it is highly probable that there are in fact no ecclesiastical laws to be administered.

The result should not surprise us, even if it be that the law of Upper Canada or Ontario contrasts as strongly with the law of England upon the same subject, as the needs of the country, its people, its establishments, the country itself, contrast with the mother country, her establishments, people and requirements.

It has been very generally accepted as law in Ontario, that a marriage within what are commonly called the prohibited degrees is unlawful, by which is meant voidable; but, inasmuch as there is no tribunal which has jurisdiction to annul the marriage, it is treated as legal. In other words, a law exists forbidding such marriages, but, on account of an infirmity in our procedure, they cannot be set aside (*c*). And *Hodgins* v. *McNeil* (*d*), the only case on the subject in this Province, is generally cited as authority for this. This case, though cited in support of a very broad proposition of law, will be found on examination to be rather contracted in its scope. The question for decision in that case was, whether a widow was disentitled to dower in the estate of her deceased husband, because the first wife of the deceased was the sister of the claimant. Esten, V.C., without expressing his reasons or referring to authority, held that the canon law, so far as it was part of the law of England, had been introduced by the Constitutional Act (*e*); that the 38 Geo. III. cap. 4, authorizing the celebration of marriages by ministers of the Presbyterians, Lutherans, etc., presupposed the ecclesiastical law to be in force here; that it is extremely doubtful whether such a marriage is

(*c*) The proposition that a law is in force which cannot be enforced is open to much hostile criticism. It is difficult to conceive why a marriage should be described as voidable *i.e.*, capable of being avoided, when those who so describe it append the very destructive qualification that it is, in fact, incapable of being avoided. The question has arisen in the United States, and there is established authority there to the effect that a law may remain in suspense awaiting a jurisdiction to administer it. But there are weighty opinions against this view. See *Bishop* on Mar. & Div. 4th Ed. Vol. I. cap. 4. It will be unnecessary to fully consider the question here if it appear that such a law was never theoretically in force.

(*d*) 9 Gr. 305.

(*e*) 32 Geo. III. cap. 1.

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against God's law, though so declared by the Statute law of England; that the Constitutional Act introduced into Canada the 25 Hen. VIII. cap. 22, the 28 Hen. VIII. cap. 7, the 28 Hen. VIII. cap. 16, and the 32 Hen. VIII. cap. 38, so far as they remained in force, and so much of the canon law as had been adopted by the law of England; that this marriage was unlawful, but must be recognized as a marriage *de facto*, as it had never been annulled; and that it was, after the death of one of the parties, indissoluble, and the children legitimate. We shall consider these holdings *seriatim*. But let us first remark, as an objection to the whole case, that it did not call for the decision of any of these points except the last. The whole argument of *Hodgins* v. *McNeil* may be shortly summed up as follows:—The marriage law of England either was in force in Upper Canada, or it was not. Assume, first, that it was not in force. Then, there was no statute or other law of Canada forbidding the marriage. Therefore, it was a valid marriage. Assume, secondly, that it was in force. What was the law? This—that, after the death of one of the parties, a marriage may not be annulled on account of affinity or consanguinity, but remains legal to all intents and purposes. This marriage was never annulled in the lifetime of the parties; therefore, it remained a legal marriage. In either event—whether the law of England was or was not in force—the result is the same. That is the whole case. Further than that it was not necessary to go; more than that it was not necessary to decide. All the residue of the judgment must therefore be *obiter dictum*.

We are prepared by our former paper for a criticism of so much of the judgment as relates to the Statutes. The fact that all the Statutes which the learned Vice Chancellor mentions, except the last, had been repealed, is some evidence that they did not undergo a very searching investigation. If the judgment is to stand upon the assumed existence in force here of these Statutes, it must recede before the authorities already cited which declared the repeal of all except the last. And if we give its full effect

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to his Lordship's expression, "so far as they remained in force," it renders nugatory nearly the whole of the learned Judge's *dictum*.

As to the other points of the judgment, we venture to say, for the reasons already given, that they are still open questions, except in so far as controlled by the Bishop of Natal's case, which we shall refer to hereafter; and we shall endeavour to discuss them fairly and openly. The only remaining questions arising out of this case are whether the Canon Law of England was introduced into, or adopted by, Upper Canada by express enactment, or is in force by implication. Against the opinion of the learned Judge that the Canon Law of England is in force by virtue of the Constitutional Act, there will be found ranged some very respectable authorities. Though the whole question revolves about the meaning of that section of the Act, 32 Geo. III. cap. 1, which we cited in our first paper (*f*), it may not be out of place to advert shortly to the general principles governing the introduction of laws into a colony. Sir Wm. Blackstone's opinion is, that in respect of a colony newly discovered and planted by Englishmen, "the colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony. The mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions are neither necessary nor convenient for them, and therefore are not in force" (*g*). The same rule prevails in the case of the general adoption by the legislature of a colony of the laws of the Mother Country. This is the case with Upper Canada under the Constitutional Act. The question came fairly up for decision in the leading case of *Doe dem. Anderson* v. *Todd* (*h*), where Sir J. B. Robinson says, "Then looking in the first place at the words of this Statute (*i*), it is my opinion that they do not place the introduction of the English law on a foot-

(*f*) *Ante*, p. 513.
(*g*) *Leith & Sm.* Bl. Com. p. 17.
(*h*) 2 U. C. R. at p. 86.
(*i*) 32 Geo. III. cap. 1.

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ing materially different, as regards the extent of the introduction, from what would have been, or rather from what was, the effect of the proclamation of Quebec of 7th October, 1763, in those territories to which it extended, or from the footing on which the laws of England stand, in those colonies in which they are merely assumed to be in force on the principles of the Common Law, by reason of such colonies having been first inhabited and planted by British subjects. * * It would have been hardly possible for the Legislature to have excepted in special terms, all those British statutes which, being inapplicable to the condition of the colony, they might not wish to include as part of the law of England; and it is impossible to allow that they could have intended by the words they used to embrace every provision in the British Statute Book which they did not specially except." And the same learned Judge reiterates this opinion in *R.* v. *Roblin* (*j*), by saying, "They adopted * * not merely the Common Law of England, but also the Statute Law, with the exceptions specified in the Act, and with other exceptions, though not specified, of such laws as are clearly not applicable to the state of things existing in the colony." Upper Canada under the statute of George is, therefore, in the same plight with regard to the English laws, as that which Blackstone depicts as the condition of a colony newly planted by Englishmen; and, in his opinion, the ecclesiastical laws are "neither necessary nor convenient for it, and therefore are not in force." What should be admitted and what rejected must be decided in each case by the Provincial Judicature, subject to the revision of the Privy Council (*k*). We have both at hand. We have a decision of our own Courts, in *Hodgins* v. *McNeil*, that the ecclesiastical laws are in force here; and we have a decision of the Privy Council, in the case of the *Lord Bishop of Natal* (*l*), upon the same point, sustaining Blackstone's opinion, and holding that they do not run into a colony. The head note

(*j*) 21 U. C. R. at p. 355; see also *Att'y-Gen.* v. *Stewart*, 2 Mer. 144.
(*k*) *Leith & Sm.* Bl. Com. p. 17.
(*l*) 3 Moore P. C., N. S. 115; S. C., 11 Jur. N. S. 353.

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in Moore's report is as follows:—"As no ecclesiastical tribunal or jurisdiction is required in a colony or settlement, where there is no established church, the ecclesiastical law of England cannot be treated as part of the law which settlers take with them from the Mother Country." And according to the reasoning of Chief Justice Robinson in *Doe dem. Anderson* v. *Todd*, the ecclesiastical laws of England would not be introduced into a colony by a general enactment of its own. Esten, V.C., had expressed his opinion in *Hodgins* v. *McNeil* several years before the *Bishop of Natal's case* was decided, otherwise his Lordship's conclusion might have been different; and we must therefore consider *Hodgins* v. *McNeil* as over-ruled upon this point by a case which our provincial judicature would be bound to follow.

Let us examine somewhat more closely the nature of the enactment, 32 Geo. III. cap. 1, with a view to ascertaining the intention of the Legislature. Esten, V.C., says, "The canon law, so far as it was part of the law of England, had been already *introduced* by the Constitutional Act" (*m*). This is a faulty expression; and, though often used for want of a more convenient term, is apt to mislead, as pointed out in *Doe dem. Anderson* v. *Todd*. Both Sir J. B. Robinson and McLean, J., have noticed the peculiar wording of the section under review, and have attributed some weight to the mode of expression adopted. The clause in question is as follows:—"From and after the passing of this Act, in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as the rule for the decision of the same." As to which, McLean, J., says, "In all matters of controversy relative to property and civil rights *resort* shall be had to the laws of England as the *rule* for the decision of the same. * * It is evident from the words of the Statute that they '*shall form the rule*' for such decisions, that the Legislature must have been well aware that in very many matters * * the laws of England were wholly inapplicable to the circum-

(*m*) *Hodgins* v. *McNeil*, 9 Gr. at p. 308.

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stances of this Province, and could not, therefore, be introduced as a *body* of laws to be enforced in all cases. They are, therefore, only to form the rule in all matters in which they can properly and reasonably be brought into operation here" (*n*). And Robinson, C.J., at p. 87 of the same report, says, "These words, too, it must be remarked, are not such as expressly introduce the whole civil law; they seem rather intended to be more prudently limited to the purpose of giving the principles of English law, modified, of course, as they may have been by statutes, as the rule of decision for settling questions as they might arise relative to property and civil rights." The distinction is important, and forms the basis of a strong argument against the existence in Ontario of the canon law of England. If the Constitutional Act had introduced the whole body of English law into Upper Canada, there would have been ground for the contention that the ecclesiastical laws were adopted by the Legislature, but remained in suspense pending the erection of a Court to enforce them. But even granting to the Statute the effect of *introducing* generally the laws of England, we are met at once by the fact that the wording is so restricted that it could introduce only the *civil* law of England, to use Chief Justice Robinson's expression, *i. e.*, the law of England as administered in the Civil Courts. Now, we have seen that the law affecting the essentials of marriage, had been, by the Statute of Edward VI., "reduced to the estate and order of the King's Ecclesiastical laws of the Realm," that its administration had been removed from the jurisdiction of the Temporal Courts, and had been relegated to the sole and exclusive jurisdiction of the Courts Christian. So that by giving this Act the most comprehensive effect that could be claimed for it, it would only embrace that part of the law affecting marriage which was cognizable in the Civil Courts, viz., the laws affecting the ceremony or formal requisites of marriage. It is plain that in a country possessing Civil Courts only, it was only necessary to provide rules for the decision of

(*n*) 2 U. C. R. at p. 90.

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such controversies as could properly arise in them, namely, controversies in respect of property and civil rights. No part of the ecclesiastical law of marriage was administered, or was capable of being administered, or was required to be administered in the Provincial Courts. No controversy could properly arise in them concerning the essentials, or the *status*, of marriage. For the jurisdiction of the Common Law Courts was expressly limited by Statute to such powers and authorities as by the law of England are incident to a Superior Court of Civil and Criminal Jurisdiction (*o*). And the Court of Chancery merely moved within the limits laid down by the Chancery Act. No rule of decision was therefore required for that which could not come into controversy. And we must attribute to the Legislature the intention not to provide for us laws unsuited to the requirements of the Province.

In *R.* v. *Roblin* (*p*), a question arose whether the 26 Geo. II. cap. 33, was in force here. This Act was directed to the formal requisites of marriage; it forbade the issue of a license for the marriage of persons under age, and required the consent of parents thereto. The eleventh section declared that marriages in contravention of this Act should be null and void. The twelfth section allowed an application to be made to the Lord Chancellor for his consent where the parents were *non compos mentis*, beyond the seas, or withheld their consent unreasonably. It was held, both in this case and in *Hodgins* v. *McNeil*, that the eleventh and twelfth sections were not in force here, though the remainder of the Act was. The reason given is the impossibility of complying with the twelfth section. Now, here is an express statutory prohibition against marrying without consent of parents. In England, an alternative was provided of applying to the Lord Chancellor for a consent. In Upper Canada the alternative could not be adopted. The prohibition, nevertheless, appears to remain; and the marriage would appear to be absolutely null and

(*o*) See C. S. U. C. cap. 10, sec. 3.
(*p*) 21 U. C. R. at p. 355.

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void, and that, too, without calling in the aid of a Court to decree the nullity. But from the practical impossibility of applying to the Lord Chancellor for a consent, or rather, on account of the want of a tribunal having power to dispense with the consent of parents, that section which would otherwise annul the marriage *ab initio*, is held not to be in force. Apply this reasoning to the point at issue. A law existed in England before the 5 & 6 Wm. IV. cap. 54, which was administered by a certain jurisdiction, whose aid was invoked to avoid that which was *prima facie* legal. That jurisdiction did not exist in Upper Canada; and from the want of a proper tribunal the law was therefore impossible of execution. Therefore the law was not brought into force. For we must attribute to the Legislature the intention not to provide laws which would be impossible of enforcement.

From a consideration of this case we deduce the following:—If that which is expressly prohibited be not illegal, because of the impossibility of adopting a course which would legalize it, *a fortiori* is that lawful, which, being *prima facie* legal, it is impossible to annul. If this reasoning be correct, it is an answer to the holding in *Hodgins* v. *McNeil*, that a marriage with a deceased wife's sister is unlawful.

We might conclude from this, that it was not the intention of the Legislature to provide a rule for the decision of controversies in ecclesiastical matters; but a further consideration of the meaning of the expression "property and civil rights," will beget still further arguments confirming this view. The expression was noticed in connection with the law of marriage in *R. v. Roblin* (supra). Sir J. B. Robinson said at p. 355 of the report, "The statute 26 Geo. II. cap. 33, being in force in England when our Statute 32 Geo. III. cap. 1, was passed, was adopted as well as other Statutes, so far as it consisted with our civil institutions, being part of the law of England at that time, relating to 'property and civil rights,' that is to the civil rights which an inhabitant may claim as a husband or wife, or as lawful

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issue of a marriage alleged to have been solemnized in Canada" (*q*). This Act formed part of the law relating to the formal requisites of marriage, or that branch of the law of marriage which is cognizable in the Temporal Courts; and the case is an authority for the view strongly indicated in the closing words of the quotation, that only that branch of the law of marriage was adopted by the Legislature.

The framers of our present Constitutional Act, the British North America Act, have furnished us with some idea of the extent of the scope of this expression, and particularly so with respect to the subject before us. The term is one that has been evidently used with a purpose in the several Acts, Imperial and Provincial, affecting the constitution of Canada. It occurs at three different periods in the history of our constitution. It is used in the Imperial Act, 14 Geo. III. cap. 83, sec. 8, which directs resort to be had to the laws of Canada (*i.e.* the French law) in the old Province of Quebec. It appears in the Provincial Act, 32 Geo. III. cap. 1 which we are reviewing. But it is not till the advent of our present constitution, under the British North America Act, in which the expression again appears, that it receives a more defined legislative interpretation by comparison with other subjects of legislation with which it is classified, and by contrast with subjects which are assigned to another jurisdiction. It is fair to assume that, in the three Constitutional Acts affecting the Canadian possessions of the British Crown, the same expression used in each should have the same meaning. The contrary it would be difficult to establish. If the same meaning is to be attributed to the expression in each act, the classification of subjects for legislation by the framers of the British North America Act, furnishes a key to its interpretation

(*q*) It is true that immediately preceding these words His Lordship says that our adoption by that Act of the law of England to the extent and with the exceptions mentioned, included the law generally which related to marriage. But the words quoted in the text, and the nature and extent of the exceptions, and the limitation of the law as adopted, are such as to show that it is only the general law relating to the civil contract that was adopted, i. e., the law relating to those questions which are cognizable in the civil courts.

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in all, as regards the law of marriage. That act divides the power to legislate upon marriage into two parts by a very distinct line of demarcation, laid down upon the intelligent principles of the English law which we have been discussing. By the ninety-first section, the right to legislate upon Marriage and Divorce is assigned exclusively to the Parliament of Canada. And by the ninety-second section, the Legislature of each Province may exclusively make laws in relation to the solemnization of Marriage in the Province, and Property and Civil Rights in the Province. Here we have the power to make laws regarding the formal requisites of marriage entrusted to one jurisdiction, while the power to legislate upon the *status*, or the essentials, of marriage is assigned to another. It is true that the law affecting the formal requisites of marriage is not, by the wording of this act, intended to be included in the expression "property and civil rights"; and it may be argued that if it did in fact come within the meaning of that expression, its express mention would have been superfluous. This, however, is not entitled to much weight; for, if carried further, it would follow that the expression "property and civil rights" does not include any part of the law of marriage, ecclesiastical or civil, because both are mentioned elsewhere. A more valuable consideration is, that, as it was intended to divide the jurisdiction over marriage, it was necessary, in order to effect this, to lay down a distinct and unmistakeable line of demarcation. And the contrast in the act is not between the solemnization of marriage and property and civil rights, but is between the solemnization of marriage and the residue of the law of marriage including divorce. By this division the Parliament of Canada controls the whole law respecting the *status* of marriage, the power to fix prohibited degrees and the ancillary power to provide for the dissolution of the *status* of marriage for any cause affecting it, either in respect of prohibited degrees or for other causes. This is peculiarly the ecclesiastical law of marriage. And by the same distribution of authority, that part of the law of marriage which may be called the civil law, or the law administered in the Civil

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Courts, is assigned to that jurisdiction which controls the cognate subjects of property and civil rights. We have here a distinct and emphatic recognition of the two entirely different classes of principles upon which the law of marriage is administered, founded upon the exact lines which bound and limit the divided jurisdiction of the English law. These expressions came before the Law officers of the Crown for consideration upon a question submitted to them, as to whether the right to issue marriage licenses lay with the Governor-General or the Lieutenant-Governors. In the despatch containing their opinions it is said, "'Marriage and Divorce,' which, by the 91st section of the same act, are reserved to the Parliament of the Dominion, signify, in their opinion, all matters relating to the *status* of marriage, between what persons and under what circumstances it shall be created, and (if at all) destroyed. There are many reasons of convenience and sense why one law as to the *status* of marriage should exist throughout the Dominion, which have no application as regards the uniformity of the procedure whereby the *status* is created or evidenced" (*r*). It is evident that the constitutional lawyers who framed this Act thought that the law respecting the *status* of marriage formed no part of the law respecting property and civil rights. We submit that this argument discloses such cogent evidence that the ecclesiastical law of marriage and property and civil rights have no qualities in common, that it amounts almost to absolute demonstration of our contention that the expression "property and civil rights" includes the civil law of marriage only; it shows that the ecclesiastical law of marriage is not a fit subject for the deliberations of that Legislature to which has been assigned jurisdiction over property and civil rights; and that those Courts which are concerned with civil matters only are not to be required to deliberate upon ecclesiastical laws; but that it is necessary to provide a special tribunal having jurisdiction over the whole area of the Dominion, to carry into effect that peculiar branch of the law which the Parliament of Canada

(*r*) *Doutre* Const. Can. 238.

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is empowered to create. The deduction from the foregoing considerations is, that the term "property and civil rights" has most probably the same meaning in each of the constitutional acts at which we have looked; that it plainly appears from the last of these statutes that it does not include the law respecting the essentials of marriage, nor are they kindred subjects; and therefore that by the Constitutional Act 32 Geo. III. cap. 1, the ecclesiastical law of marriage was not included among the other laws thereby adopted, and was therefore not in force by virtue of its provisions.

We have now considered that part of V.C. Esten's judgment which declares that the Constitutional Act introduced the canon law of England, and the unrepealed portions of the statute of Hen. VIII., into Upper Canada; and, with due deference to the learned Judge, we are forced to rest an adverse conclusion upon that higher authority which we have cited. If the ecclesiastical law is in force in Ontario, it must be by means of some other agency than the Act of Geo. III. A most important enquiry still remains to be made respecting the effect of our Provincial Statutes, and to this branch of the subject we shall address ourselves in our next paper.

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MUSIC IN THE COURTS.

(*Concluded.*)

Church music has been considered by several of the Courts. In the States of New York, apparently, they do not think very much of the kind furnished by rural choirs to country congregations. There it has been held that the mere fact that one sings in a country choir, or plays on an instrument as an accompaniment, raises no implied liability as against the church authorities to pay a *quantum meruit* for the services rendered. It will be presumed that the services were performed gratuitously. So, if an organist of a country church sues for his or her salary, he or she must clearly prove that there was an actual employment by the church, and a promise to pay binding upon the corporate body (*a*).

Every one who has been in the habit of going to church knows that in well nigh every congregation there is some one or other whose vocal organs and style of singing is not quite in accord with orthodoxy. Lately, in England, the Hampstead magistrates had to consider a lady's musical performances. A complaint was made by the minister, the Rev. Mr. Burnaby, against a lady who had not a proper estimate of her own vocal ability, which was not at all commensurate with her pious sincerity. In other respects the offender was an excellent gentlewoman of culture and education. She was decidedly in error as to the quality of her voice, which was very shrill, very high, and very thin, and she exercised it with a complete independence of the other worshippers. The result was that the lady inflicted untold tortures upon the people of the church, "through every pulse her music stole," and the nerves of the clergyman were so completely unstrung that he could not proceed with the service. The choir, also, was dissatisfied, as the lady's irrepressible vocal piety frequently rendered

(*a*) *Van Buren* v. *Reformed Church*, 62 Barb. 495.

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nugatory its best-intentioned artistic efforts. Remonstrance only evoked an expression of regret that her voice was not pleasing to the congregation, accompanied, however, by a strongly-expressed determination to continue performing the religious duty which she believed to be incumbent upon her. On the clergyman complaining to the justices that she was "troubling, vexing, and disquieting the congregation," they decided to give her a month in which to ease off and stop, and if she was not quiet in that time, to fine her £5 (*b*).

A very similar case came before the Court in North Carolina some years ago (*c*), and there it was held that the defendant was a "proper subject for the discipline of the church, but not for the discipline of the courts." In Mr. Irving Browne's interesting little work, "Humorous Phases of the Law," we are told, "The defendant was indicted for disturbing a religious congregation. He was a strict member of the Methodist Church, and a man of exemplary deportment, but he sung in such a way as to disturb the congregation. The disturbance consisted partly in his holding on the notes after the other singers had let go. He was evidently trying to realise Milton's idea of 'linked sweetness long drawn out.' This disturbance was decided and serious; 'the effect of it was to make one part of the congregation laugh and the other part mad; the irreligious and frivolous enjoyed it as fun, while the serious and devout were indignant.' Once the preacher had shut up the book and declined to sing the hymn. The presiding elder had refused to preach in the church on account of the disturbance. On one occasion, 'a leading member of the congregation, appreciating that there was a feeling of solemnity pervading the congregation in consequence of the sermon just delivered, and fearing that it would be turned into ridicule, went to the defendant and asked him not to sing,' and he then refrained. On many occasions the church members and authorities expostulated with him on

(*b*) 21 Alb. L. J. 42.
(*c*) *State* v. *Linkhaw*, 69 N. C. 214.

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account of his singing and its disturbing effects, but he invariably replied, that 'he would worship his God, and that as a part of his worship it was his duty to sing.' One of the witnesses, being asked to describe his singing, sang a verse in his voice and manner, which 'produced a burst of long and irresistable laughter, convulsing alike the spectators, the bar, the jury and the court.' The jury found Linkhaw guilty; but this was reversed because there was no proof, or pretense, of any intention or purpose to disturb the worship, but on the contrary it was admitted that he was conscientiously taking part in the religious services, and doing his 'level best.' Now, this was a serious case. The offender was a member of the church in good standing, and there was no fault in him save the eccentric character of his vocalization. But it must have been a harrowing reflection to his fellow church members that he was to be saved, and that they were bound to listen to that singing through all eternity."

As Mr. Browne says, the Courts in North Carolina seem singularly insensible to the charms of music. In *State* v. *Baldwin* (*d*), it was held no nuisance to curse and swear so loud at a tavern as to break up a singing school near by. The Judge said, the school's "interruption cannot legally be pronounced an inconvenience to the whole community. The loss of instruction in the accomplishment, to those who would fain acquire it, does not very gravely influence the good order or enjoyment or convenience of the citizens in general, so as to call for redress on the complaint of the State."

Some judges really appear to have known something about the higher kinds of music, and to have trod the loftier walks of the science of sweet sounds, and to have been able to talk of airs and melodies, accompaniments and scores, operas and dramatical performances. In *Wood* v. *Boosey* (*e*), N. had composed and published in Berlin an opera in full score. After his death, Bressler

(*d*) 1 Dev. & Bat. 195.
(*e*) L. R. 3 Q. B. Ex. Ch. 223.

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arranged the score of the whole opera for the piano-forte, and in registering the arrangement in England, N.'s name was inserted as that of the original composer. The question was, Was the piano-forte arrangement an independent musical composition of which B. and not N. was the composer? Kelly, C.B., thus spoke of accompaniments: "The accompaniment is a work of greater or less skill. In some cases, perhaps in many cases, it may be in this for aught I know, the operation of adaptation is little more than mechanical, and what any one acquainted with the science of music, any composer of experience might have been able to do without difficulty; but it may be and often is, as in the case of the six operas of Mozart by Mazzinghi, a work—I would hardly use the term of great genius—but a work of great merit and skill."

Baron Bramwell shewed his knowledge of music by the following remarks:—"The truth is, an opera is originally written for the voice, and for different instruments. In this pianoforte score, as it is called, the parts written for the voice are identically preserved, and there can be no doubt that if a man had a copyright in the original opera, such a score would be an infringement of his copyright. But when we come to the parts, not for the voices, but for the pianoforte, which is not an identical repetition of what the author wrote, it is the business of the adapter, the person who arranges it for the pianofore, to preserve the harmony and, as far as he can, the notes and all the effects of the original composition, but he cannot produce upon the pianoforte everything that the author wrote, as he wrote it. Anybody who knows anything of the orchestral score and of the pianoforte arrangement, would know that. It is a physical impossibility that fingers could play upon the pianoforte every note as it is written in the orchestral score. For example, when there is a *tremolando* in the music, that is where the violins play the same notes backwards and forwards continually, of course that cannot be done on the piano; and sometimes for a substitute an octave is played with the thumb and finger. To arrange this to the best advantage great judgment and considerable

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power of choice is required on the part of the arranger. Frequently there are other differences; there are prolonged notes in the one and not in the other; as the score of the opera is written for different instruments which cannot all be represented on the piano, the arranger puts in an octave below on the piano to give as far as possible the same effect. Many other changes must of necessity be made. It is quite clear, therefore, that what the person who arranges for the pianoforte does is something different from what the original composer has done. Anybody who plays any musical instrument knows it is a very common expression to say, such a piece is very well arranged, such a piece is very ill arranged; this is a very difficult arrangement; that is an easy arrangement. Those who play the German arrangements know they are more difficult than the English, because the German, with great conscientiousness, endeavours to put into the arrangement every note that the composer has put into the score as far as he can; whereas the English composer endeavours in all arrangements to make them clear for the player, and an English arrangement is by no means so laborious as the German. It is manifest, therefore, that there is some judgment and taste required on the part of the arranger for the pianoforte; and it is also certain that if it should happen that a man should compose an opera without being able to play on the pianoforte, which is, I believe, a perfectly possible thing, he could not arrange it himself for the pianoforte. The person who arranges for the pianoforte must have a knowledge of the instrument; it would be a bad arrangement if he put in passages that do not lie well for the hands, as it is called, so as to give a facility of playing."

Piracy is not only robbery on the sea, but also, any literary theft or infringement of the law of copyright; and copyright is the exclusive right which an author or composer possesses of multiplying copies of his own work. In speaking of stealing an air, "It appears to me," said Lyndhurst, J., "that if you take from the composition of an author all those bars consecutively which form the entire air or melody, without any natural alteration, it is a

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piracy; though, on the other hand, you might take them, in a different order, or broken by the intersection of others, like words, in such a manner as would not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now, the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear. The adding of variations makes no difference in the principle" (*f*).

"The composition of a new air or melody," says Nelson, J., in *Jollie* v. *Jacques* (*g*), "is entitled to protection; and the appropriation of the whole or of any substantial part of it, without the license of the proprietor, is a piracy."

One who adapts words of his own to an old air, adding thereto a prelude and accompaniment also his own, acquires a copyright in the combination, and may, in declaring for an infringement against one who has pirated the whole, properly describe himself as the proprietor of the entire composition (*h*). This was decided in an action brought by Samuel Lover against the defendant for pirating the words and music of "The Low Back'd Car," of which Lover claimed to be entitled to the copyright, as author of the words, prelude and accompaniment, the air being an old one known by the name of "The Jolly Ploughboy."

Chappel & Co. published a song under the title of "Minnie, sung by Madame Anna Thillon and Miss Dolly at Monsieur Jullien's concerts," with a portrait of Madame

(*f*) *D'Almaine* v. *Boosey*, 1 Y. & C. 288.
(*g*) 1 Blatchf. 618.
(*h*) *Lover* v. *Davidson*, 1 C. B. N. S. 182.

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Thillon; defendants published a song to the same air called "Minnie Dale, sung at Jullien's concerts (and always encored) by Madame Anna Thillon"; the title page contained a similar portrait to the plaintiffs'. Vice-Chancellor Wood granted an injunction to restrain the defendants from publishing their song, "Minnie Dale," or any copy or copies thereof, or any other publication containing a colorable imitation of the name, title, or title-page of the plaintiffs' song. "The defendants," said the Vice-Chancellor, "do not profess that their song is by the same composer or the same publisher. But the first thing anybody proposing to purchase the song would say would probably be, 'I want "Minnie," sung by Madame Thillon;' and that name and description, it seems to me, the defendants have no right to whatever. The plaintiffs' publication is the identical song which that lady did sing; it was composed for the plaintiffs, it is called by the name of 'Minnie,' and they had a perfect right to entitle it 'Minnie,' as a song sung by that lady; and then the name, having acquired a celebrity as the name of a song sung by her, the defendants advertise another song by the same name as sung by this lady, which cannot be meant merely to refer to the melody as sung by her. No person who heard 'Scots wha hae' sung by Braham, would ask for 'Hey Tuitte Taitte,' the name of the old melody. Therefore, it seems to me that there was a plain and palpable purpose in the assumption of the name. The original song, as sung in America, was 'Lillie Dale,' and the defendants have changed it into 'Minnie Dale,' sung by Madame Thillon, and a description can be for no other purpose than to appropriate the property of the plaintiffs" (*i*).

An injunction was also granted to restrain another defendant from publishing a song consisting of different words to the same air, with a title-page on which was a different portrait of Madame Anna Thillon, copied from an American publication, and the words, "Minnie, dear Minnie. Madame Anna Thillon" (*j*).

(*i*) *Chappel* v. *Davidson*, 2 K. & J. 123.
(*j*) Shortt, p. 197.

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A Mr. Russell had been in the habit of singing a song, called "The Ship on Fire," at public concerts; a Mr. Smith advertised a vocal entertainment, and gave this and other sensational songs as part of the programme. Mr R. sued for the penalties given by the Act for the infringement of his sole right to represent this dramatic piece. Denman, C.J., thus speaks of the defendant's performance: "The song in question is stated in the bill to be founded on the loss of the Kent by fire in the Bay of Biscay. It represents a storm at sea, the burning of the ship, and an escape by boat to another ship, and so a safe return to land. It moves terror and pity and sympathy, by presenting danger and despair, and joy, and maternal and conjugal affection. It is a dramatic piece." The readers of the *Canadian Law Times*, anxious to rival Mr. Russell or Mr. Henry Smith, will find thirty-five lines of this descriptive and dramatic song in 12 Ad. & El. N.S., p. 218, and with it we will leave them, giving them, however, the following as a warning.

Last winter, the vicar of a country parish in England got up an amateur concert to provide funds to repair the church clock and to buy coal for the poor. The net proceeds were four pounds. But alas, the law of copyright had been infringed by some performer singing "The Muleteer," a song by the late Michael William Balfe; legal proceedings were threatened to recover the penalty of £10, but matters were compromised by the vicar handing over his four pounds (*k*).

R. VASHON ROGERS.

(*k*) *Ill. London News*, 16th July, 1881.

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EDITORIAL REVIEW.

The Judicature Act.

On a very hot day in August the practice in all the Courts was fused. This is the term commonly used by the Law Reformers whose prophetic dreams have now been realized. A proper idea of "fusion" can be gained by any one who has seen raked out of the remains of a conflagration a heterogeneous mass of molten materials. Any one who has not seen this has but a poor idea of what "fusion" is. A theoretical study of the Act does not disclose any serious defects. It is not until actual practice commences that the practitioner finds himself stumbling over obstacles interposed at almost every ordinary step of a cause. The great legislative body strains itself to settle the form of a præcipe, and leaves many of the most ordinary steps in an action to depend upon implication. It is not our purpose to catalogue the defects, latent and patent, of the Act and Rules. The whole profession bear witness to the fact, that grave doubts exist upon subjects which should have been set at rest by the most explicit language. It is serious enough that there should be a doubt as to whether a writ of summons should be sealed by the Clerk of Records and Writs, or by the Deputy Registrar who issues the same. And other doubts, less grave though very aggravating, are the result of want of attention to details. For instance, Rule 22 requires that the writ of summons shall state upon its face, the office in which the appearance is to be entered. And Rule 50 directs that all proceedings (which would include entering an appearance) shall be carried on *in the office from which the writ issues.* And Rule 26 also seems to indicate that the writ and proceedings shall issue from and be carried on in the same office. Writs of summons in the County of York issue either from the office of the Clerk of the Process, or from the office of the Clerk of Records and Writs. In the latter case, accord-

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ing to Rule 50, the appearance is entered and subsequent proceedings go on in the office of the Clerk of Records and Writs, being the office from which the writ issues, until judgment, which is obtained from the Registrar. But in the other divisions, Rule 50 is more completely disregarded, for no proceedings whatever after the writ, take place in actual practice in the office of the clerk of the Process, being the office from which the writ issues, but all proceedings go on in the Registrar's office. The answer is, that every one knows that it was intended that the proceedings should go on in the office of the Registrar. But that does not cure the obvious mistake in the Rules. The practice in such ordinary cases as mortgage suits is not by any means as explicit as it should be. No provision is made for showing by the writ what the mortgaged lands are. In case of non-appearance and judgment there will therefore be nothing on the files of the Court to show what land has been foreclosed. So that it may be expedient if not necessary in every such case to deliver a statement of claim with the writ. We mention these points simply as examples of what an unfinished system of practice has been presented to us. The process of refining has but commenced. An era of doubt has begun. And it may be years before the practitioner, with the aid of numerous judicial interpretations and amendments by the Legislature, can feel that he knows how prosecute an action at law, without continuous reference to the pile of books constantly kept at elbow.

But the half has not yet been told us. The autumn sittings must be concluded; new trials must be moved for; appeals must be brought, before we shall half appreciate the working of the rules of law. Loss of time to solicitors and loss of money to suitors must be incurred, before we have a reliable practice. The question to be answered is an important one, Is the experiment worth this to the public? For experiment it is. If the Attorney-General had furnished a code of procedure, simple, effective, cheap, expeditious, and free from doubt, a sacrifice might well have been made at first in order to have such a system in good working order in a short time. But with the example

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of England before us, where, after seven years' experience of the same system, amendments and new rules are still the order of the day, we can hardly hope for better results here. In the meantime, solicitors will be paid for their work, and suitors will in course of time pay for the interpretation of the Act and Rules, and for the settling of a practice which they fondly thought the Legislature had perfected for them in the measure which it placed upon the Statute book. It makes but little difference to a suitor whether you issue a writ or file a bill; whether you dub your pleadings statement of claim and statement of defence, or declaration and plea; whether there are several Courts, or several Divisions of only one Court; or whether there exists a Court of Chancery, or a Chancery Division only. It would puzzle him to understand why a distinction should be retained among the Divisions of the High Court, if there was anything wrong in the distinction between the original Courts. What the suitor wants is reasonable cheapness in litigation, and a practice in which his solicitor is so skilled that he can, with a reasonable degree of certainty, pilot him through it to a trial of his case. Certainty in procedure and law, and as little expense as possible, will satisfy the public, who care not how this is obtained. Are these the results of the Judicature Act? Can any be found so bold as to say that they are? And if they are not, what benefit is conferred upon any one?

We have had taken away from us a procedure with which, after years of study, we had become familiar. *Via trita via tuta* is a good maxim for a lawyer, and if there were pitfalls here and there, we knew where to find them, and could avoid them. No one cried out for law reform. The public were not dissatisfied, and the Profession found things working admirably under the Administration of Justice Act. As it is now, we stumble about in strange ways, and are constantly found staring each other in the face and asking the way. Without at all instituting a comparison between the merits of the old system and the new, we ask, Is a change such as we have described, brought about at the cost of the public, who pay directly for it out of their

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own pockets, worth what it is going to cost? We have yet to prove that the new system is better than the old. It will take years to do it; and so suitors are asked to speculate upon the result. If it turns out badly, they've lost, and paid for it. If they win, well, they've paid for it anyway.

That there were many amendments required no one will deny. But there was no necessity to sweep away the good with the bad. Gradual changes would have been more beneficial than a complete revolution.

We do not deny that some most useful changes have been made. Perhaps not the least beneficial is the power given to a plaintiff to move for judgment at any early day if there be no real defence. But that relief is not dependent upon the system. It existed before, but took place at a later stage in the proceedings.

If the results of the introduction of the new practice are beneficial, it will not be because what is given us is intrinsically better than what has been taken away, but because the whole body of the profession—judges, officials, barristers and solicitors—are manfully working together in their endeavours to reduce chaos to order, and to produce, with the materials given them, an intelligible code of procedure. But it will be well for those interested to know that the work has yet to be done; and, when it is done, that the thanks will be due to the Bench and Solicitors rather than to the Legislator.

The Deceased President and the Law.

The lamentations over the death of President Garfield, the news of which has just been received as we write, are widespread and real. In every respect he seemed to be a man worthy of admiration.

The assault committed upon him was the signal for a demand, freely expressed, that *an attempt* upon the life of the chief Executive of this great nation should be made an offence punishable with death. The studied simplicity

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surrounding the office of President is, in our opinion, of questionable propriety. We are, of course, open to the accusation of being monarchical in our tastes. But we believe that the person of the President should be so protected (with a due regard to the character of Republican establishments), that a citizen who takes upon him the burden of the trusts reposed in him by his fellow-citizens might fearlessly expose himself as the head and front of a great nation. He should feel that his person receives just as extraordinary a protection as his presidential acts. He is executing the duties of an office simply, and he is entitled to the protection of those whom he serves. He is a citizen with his fellow-citizens, it is true. But they have placed him in a position, in which his life is for the time being of more consequence than the life of any other citizen of the United States. And why not extend to him a degree of protection not accorded to any other citizen? A reasonable guard, civil or military as you please, would tend to prevent the President from coming into immediate contact with the riff-raff of the country. Such a guard would in no way commit a Republic. The good sense of the people will always prevail; and they are in danger of falling under neither monarchical nor military rule. When the office is so protected; when it is understood that the life of the person accepting the Presidential chair, is of more value to the nation than the life of a citizen in a private capacity; when means are taken to place this physically before the eyes of the people; then it will be time to provide an extraordinary punishment for those who attempt an extraordinary crime. An intelligent people will always understand that he who aims at the life of the President aims at the head of the Republic, and not at a private citizen.

A serious question is raised as to the jurisdiction of the Courts of the District of Columbia to try Guitteau for murder, on account of the removal of the President to New Jersey and his death there. The *Chicago Legal News*, of the 17th September, discusses the question in anticipation of the death of General Garfield. The opinion there expressed is that the assailant can be tried, convicted, and

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executed for murder in New Jersey, though he was in the District of Columbia when he fired the shot. The authorities are said to be conflicting. A case to the contrary, however, is cited. In the *United States* v. *Blanden*, 1 Cranch, Circuit Court Reports 548, it was held that where a mortal stroke was given in the District of Columbia, but the death occurred in Maryland, the Courts of the District of Columbia had no jurisdiction of the offence as homicide, but they had of the assault and battery. Opinion seems to be at one that the only offence against the peace and dignity of the District of Columbia is the assault. Reference must then be had to the law of New Jersey to ascertain the liability of the assailant before its courts. A statute of New Jersey is cited, which provides that "where any person shall be feloniously stricken * * at any place out of the jurisdiction of this State, and shall die by the same stroke * * within the jurisdiction of this State, * * an indictment thereof, found by jurors of the county within the jurisdiction of this State in which such death * * shall happen, * * shall be as good and effectual in the law, etc., as if such felonious stroke and death thereby ensuing * * had happened in the same county where such indictment shall be found * *." Following this is the opinion of the Supreme Court of New Jersey, given by Vredenburgh, J., upon this section, in *The State* v. *Carter*, 3 Dutcher, 499, of which we give the head note. "1. An indictment charging a felonious assault and battery in New York, and that the party injured came into, and died from its effects in New Jersey, charges no crime against this State. 2. The Statute Nix. Dig. 134, § 3, cannot embrace cases where the act complained of has been wholly done within the territorial limits of another regular government. 3. Any statute to punish such an act is necessarily void." The learned Judge remarks that the death occurs in New Jersey through the voluntary act of the deceased in going there, and that the punishment becomes dependent upon the State in which the wounded man sees fit to die. He then says, "But I cannot make myself believe that the Legislature, in that act,

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intended to embrace cases where the injury was inflicted within a foreign jurisdiction, without any act done by the defendant within our own. Such an enactment, upon general principles, would necessarily be void; it would give the Courts of the State jurisdiction over all the subjects of all the governments of the earth, with power to try and punish them, if they could by force or fraud get possession of their persons in all cases where personal injuries are followed by death." He then expresses the opinion that the offence is an offence against the sovereignty of another state. "But here," he continues, "the act was done in the State of New York, a regularly organized and acknowledged supreme government. The act was a crime against their sovereignty. That was supreme within its territorial limits and in its very nature, and in fact is exclusive. There cannot be two sovereignties supreme over the same place at the same time over the same subject-matter. The existence of theirs is exclusive of ours. * * It is said, that if we do not take jurisdiction, the defendant will go unpunished * *. But New York may provide by law for such cases, and if she does not, it is her fault and not ours." United States Statutes are then quoted by the Editor upon the subject, under which the opinion is expressed that Guitteau may be tried in New Jersey, notwithstanding "the mere say so of the judge who delivered the opinion in the above case." In *Tyler* v. *The People*, 8 Mich. 326, an analagous statute was held to be constitutional. A blow was struck in Canada, and the death occurred in Michigan, and the prosecution was sustained. *Com.* v. *Macloon*, 101 Mass. 1, is also in favour of this view.

The question would not have excited so much controversy if it had been that of a private citizen. But if the judgment from which we have quoted is sound, it discloses a most serious defect in the constitution of the United States, and suggests a most formidable defence in prosecutions for murder. We shall watch the future proceedings with a great deal of interest, and we shall not be surprised if this lamentable case is productive of legislation upon the points we have mentioned.

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The Ontario Reports.

The Benchers have ordered that the reporters of the late lamented Superior Courts shall be joint reporters of the High Court of Justice. The reporter of the Court of Appeal retains his solitary office. The two Chamber reporters are now joint reporters of Chamber cases, by the same law. The reports of the cases determined in the High Court are hereafter to be published in one series of volumes, to be called the Ontario Reports. The appeal cases will be published separately, and called the Ontario Appeal Reports. The Practice Reports will hereafter be known as the Ontario Practice Reports. The advisability of throwing into hotch-pot all cases decided by the High Court is not quite apparent. It would have been better, we think, to keep the Equity cases separate from the others. But we live under a system, the predominating feature of which is the unit. There is *one* Court, though it is rather honey-combed with divisions; there is *one* procedure; cases are to be disposed of by *one* Judge as far as possible; and it has all been brought about by *one* man. The Benchers evince a laudable desire to carry out this spirit as far as practicable, and succeed to a certain extent with the reports. The reporters themselves are more difficult to deal with. There is only *one* single man amongst them. It has become necessary to amalgamate him with his co-reporter, and so his identity as a single reporter is lost. The three Superior Court Reporters are no longer several. They are as incomplete when alone as the joints of a fishing-rod. Each one is but a joint in the reporting staff upon which the High Court of Justice leans. The reporter of the Court of Appeal is the only one who is tenant in severalty of his office.

It will be a relief to many who are unfamiliar with our present system of nomenclature and citation, to be able to identify the reports with the Province.

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Dominion Silk.

The Governor General has been pleased to appoint the following gentlemen to be Her Majesty's Counsel :—

Richard Martin, Samuel Smith McDonald, Hon. Alexander Morris, Allan R. Dougall, John Charles Rykert, John Creasor, Samuel Jonathan Lane, Thomas Wardlaw Taylor, George D'Arcy Boulton, Henry Burkett Beard, Byron Moffat Britton, William Lount, William H. R. Allison, Robert Smith, Hon. Wm. McDougall, James Kirkpatrick Kerr, Thomas Deacon, Alexander Shaw, George Dean Dickson, John McIntyre, Adam Hudspeth, John Edward Rose, Charles Moss.

"And ye shall walk in silk attire."

Advertising Maniacs.

We had occasion to refer last month to a distressing case of a gentleman of the long robe who was afflicted with a mania for advertising. Another alarming case has developed itself, at a place not many miles from a city in which exists a very well conducted Lunatic Asylum. This case is best illustrated by giving a copy of the patient's ravings, clipped from a local paper to which he contributes them.

Solicitor to the Supreme Court of Judicature, Attorney-at-Law, etc., Member of the Law Society of Upper Canada, Graduate of the Law School, one of the Attorneys of Her Majesty's Courts of Queen's Bench and Comman Pleas, and a Solicitor of the Court of Chancery for Ontario, Proctor in the Surrogate, Bankruptcy, Probate and Admiralty Courts, Solicitor in the Supreme Court and to the High Court of Judicature for Ontario. Member of the Dominion Solicitors Association. Notary, etc., etc. Advice free. Collections promptly remitted. Conveyancing charges very low. ☞ Admitted to practice in all the Courts.

We should value his advice at about the price he puts upon it.

NOTE.—Some correspondence is necessarily omitted this month for want of space.

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NOTES OF RECENT DECISIONS.

Trust and Loan Company v. Lawrason, 1 C. L. T. Occ. N. 452. The decision of this case was looked for with some interest, the point at issue being an important one to mortgagees. It was strenuously argued that the intention was apparent to create a tenancy. The meaning of the words used in the distress clause of our Statutory form, came up for construction, not alone, but as appearing in the same deed with the attornment clause, set out in our note of the case. It was argued that, in the expression, "by distress warrant to recover by way of rent reserved as in the case of a demise, &c.," the words, "by way of," might in fact be left out, as they are only there for the purpose of describing the interest as rent. Against this it was argued that they meant "in the same manner as," which clearly showed that the interest was not rent, but that the same process for its recovery was to be used as was used in the case of rent. The very expression "by way of" was frequently used in memorials, and was constantly adopted by some Equity pleaders in describing a mortgage in a bill for foreclosure. "An indenture of bargain and sale by way of mortgage," meant simply "a mortgage." And this furnishes some ground for the argument, that "by way of" may be used for the purpose of description. The phrase we have quoted, however, may be paraphrased thus: That species of bargain and sale which operates as a mortgage. The same process cannot be applied to the case in point, without demonstrating at once that there must be an agreement that the interest shall in fact be rent, in order to carry out the plaintiff's intention; for interest cannot be said to operate as, or have the effect of, rent, unless it is in fact rent. That is the whole question at issue—Was it interest or rent. If interest, it could not operate by way of rent.

Regina v. Mulholland, 1 C. L. T. Occ. N. 551. We call attention to this case as confirming the views taken by Mr. Palettoe in his article at p. 285, (*ante*) entitled, "Can the jury convict of common assault upon an indictment for murder or manslaughter."

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BOOK REVIEWS.

Outline of an Action under the Ontario Judicature Act, showing at a glance the procedure under the Act and rules; an adaptation of Mr. Herbert E. Boyle's "Précis of an Action under the English Judicature Act and Rules." By WALTER BARWICK, M.A., Barrister-at-Law. Toronto: Willing & Williamson, 1881.

Mr. Barwick does not claim originality for his manual, having merely adapted Mr. Boyle's book to the Ontario practice. This has been accomplished not without industry and painstaking. The plan of the book is to show the proceedings in an action in their proper order; and the method employed to carry out this plan has been to collate those parts of the Act and rules which lie in different parts of the Statute under different headings, concentrating upon each particular step in the cause all that apply to it. For instance, under the heading "Appearance," we find the effect of the following rules given:—33, and 51 to 68. All verbiage, necessary in the rules but unnecessary in a plain direction as to what is to be done, is pruned off; and the rules we have referred to are condensed into three of the small pages of this little work, while they occupy *in extenso* three pages of the Ontario Statutes. The chief value of such a book is that one can, by reading it through, gain a somewhat orderly and connected idea of what an action is at the present time; whereas, a study of the Act and rules themselves necessarily involves at first a disconnected study of each order, without regard to the various steps in an action which it may affect, and constant cross-references to and comparisons of the various portions of the statute with each other. To have this done for one is a step saved. A list of the subjects and rules not touched upon is given at the end.

The typography is excellent, and the arrangement such that the headings and sub-heads readily catch the eye.

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Although an index is appended, it might have been dispensed with; for the period at which a step occurs in an action determines the place in the book at which it is treated of; and the title of the subject in the text appears at the head of each page.

Principles of the Law of Torts; or, Wrongs independent of Contract. By ARTHUR UNDERHILL, M.A., of Lincoln's Inn, Barrister-at-Law; assisted by CLAUDE C. PLUMPTRE, of the Middle Temple, Barrister-at-Law; with American cases, by NATHANIEL C. MOAK, Counsellor-at-Law. Albany, N. Y.: William Gould & Son, 1881.

Mr. Moak is known to many Canadians as a most industrious annotator and editor of English books. The library of Osgoode Hall bears ample testimony to his industry. We therefore expect, upon taking up one of his works, to be rewarded by reaping the fruits of vast energy and diligence. Many would venture to say that, with a digest of cases at hand, and an English book, the production of an American edition is a matter of mechanical work only. But a look through Moak's Underhill on Torts will convince any one that its editor possesses a faculty for arrangement, and an orderly mind which many a one might envy.

The book has grown corpulent, under the treatment it has received at the hands of the American editor. With the text all are familiar. Indeed, in a review of such a work, any remarks thereon are more properly addressed to the American annotations than to the body of the book. The number of cases cited therein is enormous, but they are so methodically arranged that no confusion is apparent. When necessity requires it, they are classed under states and countries.

A special feature of the book, and one that should recommend it to Canadians, is the frequent reference to Canadian cases. Our American cousins are fond of including Canada and Canadian in the terms America and

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American—when it suits them. And, indeed, they are not without one or two sympathisers in Canada, who think that Nature is outraged by the existence of an imaginary line drawn across one of her Continents. However that may be, Mr. Moak is satisfied with referring in his title-page to American cases only; and there is no indication, except in the pages themselves, that there is such a number of Canadian cases cited throughout, as to justify some reference to them in the title of the work.

We look upon this publication as a most useful reference book. It is better than a digest, while partaking largely of its character; for we have the benefit of Mr. Underhill's concise rules as a text to which the digest of cases is appended.

BOOKS RECEIVED.

A Treatise on the Law of Sales of Personal Property, with references to the American decisions and to the French code and civil law, by J. P. Benjamin, Esq., Q.C., of Lincoln's Inn, Barrister-at-Law; third American, from latest English Edition, by Edmund H. Bennett. Boston: Houghton, Mifflin & Company, 1881.

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REVIEW OF EXCHANGES.

American Law Register.—July, 1881.

Contempt of Court, by CHARLES CHAUNCEY, is concluded. The power of Inferior Courts is treated of. "Nothing shall be intended to be within the jurisdiction of an inferior Court, but what is expressly alleged to be so." The logical result is, that they are subject to examination and control by the higher Courts. To enable the higher Courts to perform their functions, the inferior Court must set out all the facts and circumstances of the contempt. One Court will not punish contempt to another.

The Freehold Qualification of Jurors, by WILLIAM S. BRACKETT, concluded in the following number. The ancient history of juries as far as their qualification goes is given by the citation of a number of old cases, from which it appears that the principal deficiency of a juror is want of a freehold qualification; and the reason given is, that persons of no qualification "by reason of their meanness and poverty, were easily liable to be bribed or suborned." It is said to be a part of the constitution of the various States of the Union that there should be a freehold qualification; for the Common Law of juries was adopted without modification.

Ibid.—August, 1881.

Contributory Negligence by Persons with Defective Senses, by A. DAVIS SMITH. Wharton's proposition, that a person who exposes himself to injury cannot recover damages, is given. The learned writer says, "That persons of defective understanding and of tender years have special immunities before the law, is now well settled." A discussion of some American cases upon the law as it affects deaf and blind persons respectively is summed up as follows:—1. The law requires ordinary care of every one. 2. It never exacts more than ordinary care. 3. Ordinary care is, that care which may reasonably be expected of any one in his circumstances. 4. A person of defective senses is bound to the diligent use of such senses as he has; and if his defects are such as to deprive him of material aids to safety, which ordinary persons have, conduct may be negligent in him which would not be so in ordinary persons. 5. In all cases the question of ordinary care is for the jury.

In *Hutton* v. *Windsor*, 34 U. C. R. at p. 496, Richards, C.J., cites, apparently with approval, *Winn* v. *Lowell*, 1 Allen 180, to the effect that a person of poor sight must exercise greater care in walking in the street than is required of a person of good sight.

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Ibid.—September, 1881.

Bills to Quiet Possession and Title, by HENRY WADE ROGERS. The ancient remedy, afforded by the Courts of Equity, to persons who were frequently disturbed by litigation as to their right to possession, is touched upon. There then follows a review of various American Statutes providing as a general rule that persons in possession may call upon persons asserting title to have the question decided in an action.

Exemplary Damages, by EDW. C. ELIOT. The learned writer remarks the growing conviction that the law of punitive damages has been built upon a wrong foundation. He says, "It seems to me that the mingling of the criminal principles with the civil, which the doctrine necessitates, is altogether wrong. And even, if it be allowable to fine the defendant in a civil court, there seems no reason why the plaintiff should be the recipient." The preponderance of authorities, however, sustains the doctrine of vindictive damages. American cases are almost exclusively cited.

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Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 45TH VICTORIÆ.

During this Term the following gentlemen were called to the degree of Barrister-at-Law :—

Called with honours: John Henry Mayne Campbell. Called: George Anthony Watson, John Sanders Macbeth, Horace Edgar Crawford, George Gordon Mills, Jeffrey Agar McCarthy, Charles Miller, Allan McNab, James Scott, Conrad Bitzer, William Elliott Macara, Samuel George McKay, James Brock O'Brian, Frederick Herbert Thompson, Frederick William Kittermaster, Alexander Ford, James Walter Curry, Edward Norman Lewis, Frederick Case, Abraham Nelles Duncombe, William Franklin Morphy. The names are placed in the order of merit.

The following gentlemen who passed their examination in Easter Term, 1881, were also called to the Bar this Term :—

Frederick Faber Harper, Solomon George McGill.

The following gentlemen were admitted into the Society as Students-at-Law, namely :—

GRADUATES OF UNIVERSITIES.

Hugh St. Quentin Cayley, William Durie Gwynne, Thomas Chalmers Milligan, Alfred Morrison Walton, Douglas Armour, Thomas B. Bunting, Walter Laidlaw, Thomas Joseph Blain, George Washington Field, Samuel Clement Smoke, Henry Herbert Collier, Frederick W. Hill, Charles William Lasby, John Bell Jackson, James Metcalf McCallum, Thomas Edward Williams, George Morton, Frederick Ernest Nellis, Alexander Cameron Rutherford, Frank Henry Keefer, Lucius Quincy Coleman, Henry Thomas Shibley, Joseph Werley St. John, John Douglas.

MATRICULANTS OF UNIVERSITIES.

Edward W. Hume Blake, Herbert Carlton Parks, Edward Charles Higgins, William H. Holmes, R. S. Smith, John Werley White, John Paul Eastwood.

JUNIOR CLASS.

William Murray Douglas, George Marshall Bourinot, Thomas Urquhart, Alexander William Marquis, John Bell Dalzell, Osric L. Lewis, Frederick Stone, Alexander David Hardy, Donald James Thomson, Joseph Coulson Judd, Parker Ellis, John O'Hearn, Francis McPhillips, Henry Clay, Robert Casimir Dickson, Arthur Clement Camp, John Carson, Douglas Harington Cole, Thomas Steele, Andrew Charles Holter, Matthew Joseph McCarron, Robert G. Fisher, Charles Meek, W. H. F. Holmes, Paul Kingston, Harry George Tucker, Richard Vanstone.

And the preliminary examination for Articled Clerk was passed by William Mansfield Sinclair.

NOTE.—The Curriculum continues as before until after next Term.

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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

In the Court of Appeal.

Q. B.] [17TH SEPTEMBER, 1881.

GIBSON v. McBRIDE.

Conflicting Evidence—New trial refused—Appeal.

Where there was conflicting evidence, and the Court below had discharged a rule for a new trial, granted on affidavits and on the ground that the verdict was against law, evidence and the weight of evidence,

Held, that this Court could not interfere.

Bethune, Q.C., for the appellant.

Guthrie, Q.C., and *Donaldson*, for the respondent.

BLAKE, V.C.]

GAUGHAN v. SHARPE.

Prayer for general relief—Effect of—Relief not specifically prayed for.

If the allegations in a bill state a case entitling a party to relief, he may under the general prayer have it, though he may have prayed specifically for other relief; but a plaintiff cannot take advantage of the ambiguity of his own pleading so as to claim, upon facts stated in the bill, a relief entirely foreign to the scope of the bill.

A creditor's bill prayed that the proceeds of an insurance policy which had been effected by the deceased for his first wife and children should be subjected, in the hands of the executors, to the payment of the plaintiff's claim, and that the executors might be restrained from paying over the money. The Court below over-ruled a demurrer thereto, and under the prayer for general relief granted administration.

Held, reversing the decision of the Court below, that the demurrer should have been allowed, and that the plaintiff was not entitled to the administration decree.

J. H. Macdonald, for the appellant.

E. Blake, Q.C., for the respondent.

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FREED v. ORR.

Judgment against executor—Execution—Sale of lands under—Validity of.

Lands are liable to be sold under execution, on a judgment against an executor or administrator, only for a debt of the testator or intestate, and a sale of the same cannot be upheld, if, in fact, the judgment were not recovered in respect of a debt of the deceased.

But where a judgment is recovered for the debt of a living person, or against executors for a debt of the testator, the sale of land under the writ, valid on its face and authorized by the conclusion of the record, passes a good title thereto, and the debtor could recover only the money made under the execution, and not the land, in case of a reversal of the judgment for error on the record.

Bethune, Q.C. and *Ferguson, Q.C.*, for the appellant.

E. Blake, Q.C. and *W. Cassels*, and *Beck*, for the respondents respectively.

C. C. YORK.]

PROCTOR v. AMBLER.

Statute of Frauds—Goods over £10—Delivery of—Verdict against evidence—Appeal.

A delivery and acceptance of goods exceeding the value of £10, in order to satisfy the Statute of Frauds, must be in pursuance of a contract of sale. Where, therefore, the plaintiff, an out-going tenant of premises leased from the defendant, handed the key to the latter,

Held, reversing the decision of the Court below, that this was not a delivery, or symbolic delivery of the goods upon the premises which would satisfy the Statute.

When the Court was satisfied on the evidence that the verdict for defendant was wrong, and that it was not merely against the weight of evidence, but against the evidence, the appeal was allowed and a non-suit directed.

Falconbridge, for the appellant.

Proctor, for the respondent.

C. C. NORFOLK.]

REID v. HUMPHREY.

Alteration of negotiable instrument—Onus of proof.

While a promissory note was in the hands of the plaintiff's testator, the name of the payee, "D. P.," was improperly added thereto, as a maker.

Held, affirming the judgment of the Court below (Morrison, J.A., dissenting), that it was such a material alteration as to vitiate the note; and that this would have been so, even if the name had been placed there by D. P., or by his authority, as an additional maker of the note.

Held, also, that the *onus* would have lain upon the plaintiff's testator, if alive, to account for the placing of the name where it was, and to rebut the inference arising from the alteration, and the fact of his death did not shift the *onus*.

Per Morrison, J.A. In the absence of evidence, the name of the payee appearing under those of the makers would raise the presumption that it

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was placed there as an indorsement; and if it was in fact forged, it was ineffectual to alter the character of the note, and therefore did not vitiate it.

Clement, for the appellant.

Falconbridge, for the respondent.

C. C. OXFORD.]

WILSON v. BROWN & WELLS.

Promissory note by firm of solicitors—Amendment on appeal from County Court.

The plaintiff lent money to H., who procured B., one of the defendants, who were known to the plaintiff as a firm of solicitors, to sign the firm name to the note, jointly with him, without the knowledge or consent of his partner. The defendants had done business with a bank, agreeing therewith to recognize each other's right to sign mercantile paper in the name of the firm, but the plaintiff was unaware of this when he took the note. It was proved that the defendants had a contract for the construction of a government work.

Held, that the plaintiff could not recover against the defendants; but that there was no reason, save the technical objection to the constitution of the record, against his recovering against B. who had signed the note, and that the record should have been amended by striking out W.'s name therefrom, and a verdict entered for the plaintiff.

A verdict had been entered for defendants in the County Court, and a rule *nisi* to set the same aside was refused.

Held, that there was no power in this Court to make the above amendment; but the appeal was allowed so far as to direct the granting of a rule *nisi*, upon return of which the amendment might be made in the Court below.

Robinson, Q.C., for appellant.

Ferguson, Q.C., for respondents.

In the Queen's Bench.

[OSLER, J., 30TH JUNE, 1881.

GRANT v. McALPINE.

Verdict—Judgment—Set-off.

The plaintiff had recovered a verdict for $600 against the defendant for malicious prosecution, but judgment was not signed thereon. At the same Assizes, the defendant recovered a verdict against the plaintiff for $2,180 on promissory notes, and signed judgment. The plaintiff, almost immediately after its recovery, assigned his verdict to his brother, but the Court held this to be a device to prevent a set-off.

Held, that the defendant was entitled to have the plaintiff's verdict set-off *pro tanto* by entering satisfaction upon his judgment to the extent of the verdict, and paying the costs of suit; and it made no difference that judgment had not been entered by the plaintiff upon his verdict.

J. K. Kerr, Q.C., for plaintiff.

McCarthy, Q.C., for defendant.

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High Court of Justice.

QUEEN'S BENCH DIVISION.

[OSLER, J., 17TH SEPTEMBER, 1881.

REGINA v. GREAVES.

Road company—Repairs—Engineer—Appointment of—Qualification of—Non-payment of tolls—R. S. O. cap. 152.

An engineer requires no certificate of qualification or degree to entitle him to act under R. S. O. cap. 152.

The engineer first appointed by the County Judge to examine into and report upon the state of repair of toll roads, must act throughout, unless another is duly appointed by the County Judge. The validity of a second appointment cannot be enquired into, if the County Judge is satisfied of the necessity for his appointment.

An engineer having been appointed to inspect and report upon the state of a toll road in the County of Kent, but not having certified its efficiency, the County Judge, at the request of the directors of the road company, authorized a second engineer to examine and report as to the present condition of the road. Tolls had been suspended, as the repairs required by the first engineer had not been completed within the allotted time. The engineer examined the road, but was unable to certify as to its state of repair on account of its being covered with snow, and merely reported that he had examined it. Three months afterwards, at the request of the road company, and acting under the same authority, he certified the road to be in efficient repair, and tolls were again demanded. The defendant refused to pay toll and was convicted.

Held, that the conviction was wrong; for by his appointment, the second engineer was expressly limited to a report upon the then present condition of the road, and that he had become *functus officio* upon making his first report.

Ewart, for the conviction.

Pegley, contra.

In re RYER v. PLOWS.

Memorandum of conviction—Appeal to Sessions—Return of conviction after verdict—Mandamus.

A conviction must be under seal.

A conviction may be returned and proved at any time during the hearing of an appeal therefrom to the General Sessions, or, in the discretion of the chairman, even during an adjournment for judgment.

A memorandum of conviction, signed by the Justice, was returned to the Sessions upon the entering of an appeal therefrom by the defendant. The jury found the defendant guilty of the offence, of which he had been convicted; but, on motion for judgment, he took objection that there was no conviction returned or proved. The chairman reserved judgment. During the adjournment for judgment, the Justice returned and filed a conviction under seal, whereupon the chairman would not give judgment,

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declining to receive the conviction in evidence, and holding that there was no conviction upon which to found the appeal, which had been heard.

Held, that the prosecutor was not entitled to a mandamus to compel him to deliver judgment; for the reception of the conviction in evidence at that period was in the chairman's discretion, which could not be reviewed.

George Bell, for the motion.

W. H. P. Clement, contra.

[23RD SEPTEMBER, 1881.

In re PECK & THE TOWN OF GALT.

Dedication of public square—Powers of municipality—By-law not in public interest—The Municipal Act, ss. 467 and 509—Costs.

A municipal corporation acquiring land by purchase, untrammelled by any trust as to its disposal, may deal with it in any manner authorized by section 509 of the Municipal Act; but they are not thereby empowered to deal similarly with lands dedicated by the owners for a special purpose, in which case their powers are clearly pointed out by section 467, s-s. 8. If the corporation accepts the land, it makes no difference whether the dedication arises only from the act of the owner or upon express grant to the municipality.

The owner of land dedicated to the public a square, by filing a plan upon which were the words, "Square to remain always free from any erections or obstructions."

Held, that the municipality had no power to close up part thereof and dispose of it to trustees of a church for building thereon.

The by-law for this purpose contained a provision that the trustees of the church should pay all expenses in connection with the by-law, and that it should not go into operation, till a satisfactory bond of indemnity had been given to the Municipal Council against loss which might be incurred by reason of passing it, and of proceedings that might be taken to quash it.

Held, bad on its face, for it was plainly not passed in the public interest, but for the benefit of a particular class.

Held, also, that the applicant was not disqualified from moving against the by-law by reason of his having expressed an opinion in its favour before its passage.

Costs were not asked for in the rule, though they were at the Bar.

Held, that, as costs are in the discretion of the Court under the O. J. Act, this was no objection.

C. A. Durand, for the rule.

J. K. Kerr, Q.C., contra.

CHANCERY DIVISION.

[FERGUSON, J., 12TH SEPTEMBER, 1881.

KEEFER v. MACKAY.

Will, construction of—Vested estate—Trustee for sale—Partition

A will contained a devise, in trust for the maintenance of the testator's widow, during her life or widowhood, with a direction that she should have

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the full right to possess, occupy, and direct the management of the property; and at her death or second marriage, "my son Thomas, if he be then living, shall have and take lot one, which I hereby devise to him." Thomas died before his mother.

Held, that he took a vested remainder in lot one.

The will further contained a devise of lots two, etc., to the testator's sons, Alexander, John, Charles and Thomas, their heirs and assigns, as tenants in common, and a direction that the same should take effect from and after the death or second marriage of the testator's widow. There was a proviso that if any child died without issue before coming into possession of his share, the same should go to the survivors. An indenture was executed between the parties conveying all the estate, etc., of those interested to Alexander, John, Charles and Thomas, after the execution of which Alexander and Charles died. An Act of Parliament was subsequently passed confirming this indenture, and declaring that it should take effect from its date, and not be affected by subsequent death of the testator's children, and it confirmed the estate in John and Thomas as tenants in common, subject to the life estate of their mother, and with the right of survivorship between them, in case of one dying before the death or marriage of their mother. After this, and in his mother's lifetime, John died.

Held, that Thomas took a vested remainder in fee expectant upon the determination of his mother's life estate.

The residue of the estate was directed to be converted and to be at the disposal of the widow for her life while she remained unmarried, and thereafter to the children. This was subject to the above proviso as to coming into possession.

Held, that the children took a vested interest in the fund, subject to be divested on the contingency mentioned.

The plaintiff being a trustee for sale, was held not to be in a position to ask for partition.

S. H. Blake, Q.C., for plaintiff.

John Hoskin, Q.C., for infant defendants.

McLennan, Q.C., *Rae* and *Black*, for other defendants.

[THE CHANCELLOR, 29TH SEPTEMBER, 1881.

CAMPBELL v. CAMPBELL.

Fraudulent conveyance—Alimony—Demurrer—Parties—Pleading.

Where a fraudulent disposal has been made of a defendant's property, the Court will intercept its further alienation, and keep it in the hands of the grantee, under the impeached conveyance, till the plaintiff can obtain a declaration of the invalidity of the conveyance and a recovery of judgment of the amount claimed.

In a bill for alimony, it was alleged that the husband and his co-defendant had entered into a conspiracy, so to deal with the husband's property as to prevent the wife from recovering any alimony. The grantee of the land demurred for want of equity, multifariousness and want of parties.

Held, that as the demurrer admitted the conspiracy to defraud, the case was brought within the above rule; but that the plaintiff not being an

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execution creditor, must sue on behalf of herself and all other creditors, and the demurrer for want of parties was allowed.

Meredith, for the demurrer.

I. Campbell, contra.

NEEDHAM v. NEEDHAM.

Ne exeat—Bail—Rights of sureties—Payment of penalty—Discharge of bond.

A bond under a writ of *ne exeat* cannot be superseded by a surrender of the principal.

The failure to pay interim alimony pursuant to the order of the Court is a breach of the bond.

Upon such a breach the plaintiff is entitled to the payment into Court by the sureties of the amount for which the writ is marked, to be applied in payment of arrears of interim alimony.

Upon such payment the sureties are entitled to have the bond discharged, but not in the absence of the Sheriff before he has assigned it.

Meredith, for plaintiff.

Bayley, for the sureties.

IN CHAMBERS.

[THE CHANCELLOR, 5TH SEPTEMBER, 1881.

HIPKINS v. HIPKINS.

Partition—Adverse title—Practice—Costs.

It is improper to apply under G. O. 640 for partition where it is known to the applicant that the defendant will claim the land adversely.

In such a case, where an application was made in a pending proceeding for leave to file a bill, the motion was refused with costs, the applicant to pay also the costs incurred in the Master's office.

Nesbit for the motion.

J. H. Macdonald, contra.

[15TH SEPTEMBER.

McFARLANE v. McFARLANE.

Disclaimer—Examination of disclaiming defendant.

To a bill to set aside a conveyance as obtained by fraud, a defendant, wife of her co-defendant, denied all charges of fraud and disclaimed all interest in the subject matter of the suit, and asked for costs. She declined to be examined after answer upon the alleged fraud.

Held, that the questions were proper, and that the plaintiff was entitled to an order that she attend and be examined at her own expense.

H. Cassels, for the motion.

W. H. Macdonald, contra.

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[20TH SEPTEMBER.

AITKIN v. WILSON.

Changing reference—O. J. Act—Decentralization.

A decree directed a reference to the Master in Ordinary to take the accounts of a co-partnership which had carried on business in the County of Simcoe. A motion was made to change the reference to Barrie, and it appeared that the Master would not be free from appointments until November. The Official Referee refused the motion.

Held, on appeal, reversing his decision, that the reference should be changed; though, but for the number of appointments in the M. O., it would not have been changed.

Held, also, that as regards the principles of balance of convenience upon which references were changed, the policy of the O. J. Act is to decentralize business and to send local business to local Masters. Costs were made costs in the cause.

Mulock, for the appeal.

Hoyles, contra.

[OSLER, J., 17TH SEPTEMBER.

In re WILSON v. GESNER.

Division Court—Commitment—Warrant, regularity of—Habeas Corpus.

A warrant of commitment in the Division Court should show upon its face the grounds for the committal.

Where, therefore, a warrant expressed the commitment to be for non-payment of $10 a month ordered by the Judge to be paid,

Held, insufficient; for it should have shown also that the Judge was satisfied that the defendant was able to pay, and neglected or refused to do so; and the defendant was discharged.

A writ of *Habeas Corpus* is a writ of right in such a case.

E. B. Brown, for the defendant.

E. Douglas Armour, contra.

[29TH SEPTEMBER.

FRIENDLY v. CARTER.

Short notice of motion—Leave for—By whom granted—Notice of trial—Countermand.

Leave to serve short notice of motion on appeal from the Master in Chambers should be obtained from a Judge, and not from the officer appealed from, thus following the former practice in Chancery.

Held, also, on appeal from the Master in Chambers, affirming his decision, that a notice of trial, under the O. J. Act, cannot be countermanded by either party.

H. W. M. Murray, for plaintiff.

Perdue, for defendant.

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[THE MASTER, 20TH SEPTEMBER, 1881.

LAIDLAW v. ASBAUGH.

Ejectment—Issue—Notice of trial—Rule 494.

A writ of ejectment was served on 15th August, 1881, and an appearance entered after the 22nd of the same month.

Held, that the plaintiff need not file a statement of claim under the O. J. Act, and a notice of trial served immediately after the entry of the appearance was regular, the cause being then at issue.

Shepley, for plaintiff.

G. B. Gordon, for defendant.

TRUST AND LOAN CO. v. HILL.

Land, action to recover—Judgment—Rule 322—Admission.

In an action for the recovery of land, the plaintiff may obtain an order to sign final judgment, under Rule 322, upon a sufficient admission of the defendant in the pleadings or on his examination.

Marsh, for plaintiffs.

[22ND SEPTEMBER.

SCHNEIDER v. PROCTOR.

Close of pleadings—Notice of trial.

A cause is at issue under the O. J. Act, where a joinder of issue has been filed, or when three weeks have elapsed from the delivery of statement of defence.

A notice of trial served before either of these events has happened is irregular and will be set aside.

I. Campbell, for defendant.

Drew, Q.C., for plaintiff.

LUMSDEN v. DAVIS.

Notice of trial—Time—Agent, service on.

Where a notice of trial is served upon the Toronto agents of a solicitor, he is not allowed two days' additional time, as he was under the former practice.

Alan Cassels, for defendant.

G. B. Gordon, for plaintiff.

[28TH SEPTEMBER.

BURROWS v. LEAVENS.

Chamber motion—Cross-examination on affidavits.

The parties to a chamber motion are entitled to cross-examine each other pending the motion upon affidavits filed, without an order for that purpose.

Holman, for the motion.

G. H. Watson, contra.

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[THE OFFICIAL REFEREE, 12TH SEPTEMBER.

ADAMSON v. ADAMSON.

Appeal bond—Qualification of surety—Registration of conveyance.

In the course of the examination of one of the sureties to an appeal bond, he stated that he had had for some years unregistered conveyances to himself of certain lands. It appeared that the lands were of sufficient value to qualify him.

Held, that the appellant should procure the registration of the conveyances, or furnish another surety.

Langton, for the motion.

W. Barwick, contra.

Magistrate's Case.

REGINA v. FRAZER.

Liquor License Act, sec. 14—Selling liquor in two places on premises.

The defendant, being the proprietor of a summer hotel and pleasure grounds known as "The Frazer House," had a license limited to six months, under the 18th section of the Liquor License Act, to sell liquors "upon the premises known as the Frazer House." A large number of pleasure seekers resorted to these grounds during the summer months, and, at times, the hotel proper would not accommodate all the guests. In order to obtain more enlarged accommodation, an outside room was fitted up as a dining hall and bar-room, being on the land immediately adjacent to the hotel proper, and forming part of the lot belonging to the defendant upon which the hotel was built, and commonly used as the pleasure grounds thereof. The defendant was convicted by the Police Magistrate of Port Stanley, under the 14th section of the Liquor License Act, of the offence of selling liquor upon premises not described in his license, and was fined $20 and costs. An appeal was had under section 71 of the Liquor License Act.

HUGHES, Co. J., *held* (i) that the expression "premises known as the Frazer House" must be taken in its colloquial sense, and therefore included the land appurtenant to the hotel and used for the better enjoyment thereof, as well as the building itself; and that the appellant's license covered the whole premises occupied by him for the purposes for which the license was given. (ii) That as a duly licensed hotel-keeper is not confined to selling liquors in his bar-room, but may serve and sell them in any part of the house for the convenience of his guests, so he may serve and sell them on the verandah of, or in the grounds appurtenant to, the hotel for the same reason; and, to accomplish this, that he may fit up the necessary accommodation therefor.

Appeal allowed and conviction quashed.

Colin Macdougall, for the appellant.

Stanton, contra.

(Reported by Colin Macdougall, Esq., Barrister-at-Law).

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THE

CANADIAN LAW TIMES.

VOL. I. NOVEMBER, 1881. No. 16.

ON THE LEGAL DEGREES OF MARRIAGE IN CANADA.

III.

IN our last paper we considered the effect of the constitutional Act with respect to the Ecclesiastical Law of marriage, and adduced arguments leading to the conclusion that that Statute only effectuated the adoption of the English civil law as a rule for the decision of such matters as it was possible to bring into controversy before the civil Courts; that matters involving questions of ecclesiastical law and jurisdiction could not come into controversy in our Courts, and that no rule of decision was therefore provided for them. We showed that, before Lord Lyndhurst's Act, marriage in England between persons within the prohibited degrees was (as it has been expressed) a canonical, and not a civil, disability (*a*); that the domiciled inhabitants of Her Majesty's Colonies are not, in the absence of Colonial Legislation, subject to canonical disqualification; that, by no existing law, in the absence of Colonial Legislation, are they civilly disabled from contracting marriage by reason of consanguinity or affinity; and therefore, that, in the absence of any Statute of Upper Canada affecting the degrees of marriage, we are not subject to any law of marriage, excepting that affecting the formal requisites.

(*a*) *Ernst*, Mar. & Div. 183.

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It now becomes our duty to examine our legislation subsequent to the Constitutional Act, in order to ascertain whether any disabilities have been therein imposed upon us. To return to *Hodgins* v. *McNeil* as our text. The learned Vice-Chancellor whose decision we criticise held that the 38 Geo. III. cap. 4, authorizing the celebration of marriages by ministers of the Presbyterians, etc., presupposed the Ecclesiastical Law to be in force here. There is, in fact, no statute of Upper Canada expressly prohibiting marriage between persons within what are commonly called the prohibited degrees. There are, however, expressions in our marriage Acts which bear strong indications of an opinion entertained by the Legislature that the Canon Law extended to Upper Canada. The argument that it is in force here, because of its apparent recognition by the Legislature, is a fair and forcible one, and the provisions of the marriage Acts of Upper Canada furnish food for serious reflection. Upon a similar course of reasoning the Statutes of Mortmain were held to be in force in Upper Canada (*b*), though it had been already decided in England (*c*) that they were purely local in their scope, and quite unsuited to the state of society in the colonies, and though the same decision would have been rendered here had it not been for the understanding of Parliament that they were in force, which was unmistakably implied in one of our Statutes, which we shall shortly refer to. To a similar test must the Canon Law be submitted.

We shall refer to the Statutes of Upper Canada affecting marriage in their chronological order. The 33 Geo. III. cap 5, recited that, "whereas, many marriages have been contracted in this Province at a time when it was impossible to observe the forms prescribed by law for the solemnization thereof, by reason that there was no Protestant Parson duly ordained residing in any part of the said Province, nor any consecrated Protestant Church or Chapel within the same, and the parties thereto may be subjected to various

(*b*) *Doe dem. Anderson* v. *Todd*, 2 U. C. R. 82.
(*c*) *Attorney-General* v. *Stewart*, 2 Mer. 144.

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disabilities; in order to quiet the minds of such persons, and to provide for the future solemnization of marriage, Be it enacted, etc." It then proceeded to validate the marriages of all persons, not being under any *canonical* disqualification to contract matrimony, before Magistrates Commanding Officers, etc.; and the parties thereto [illegible] their issue were to have the same benefits and be subject to the same obligations as if the said marriages had been solemnized according to law. It then gave power to Justices of the Peace, until Parsons should become more plentiful in each district, to celebrate marriages according to the forms prescribed by the Church of England between persons not under *canonical* disability, neither of whom was within a distance of eighteen miles of a Parson. At the time of the passage of this Act, if the preamble be true, the 20 Geo. II. cap. 33, providing for the issue of licenses and a ceremony was plainly inapplicable to the state of society here, and, upon a course of reasoning already pointed out, could hardly, at that time, have been held to be in force. In fact, for some time afterwards, the question whether it was in force or not, was a moot question. In *R.* v. *Senkler* (*d*) it was doubted, and in *R.* v. *Bell* (*e*) the Act was thought not to be in force; but, finally, it was decided in *R.* v. *Roblin* (*f*), that parts of it were law here. But the state of society when *R.* v. *Roblin* was decided was very different from its state when the Statute of Geo. III was passed. If the Imperial Act had not been in force, then the marriages, of which some were validated by the 33 Geo. III. cap. 5, would have been good at Common Law. But we must accept the interpretation of the Legislature, that they were of doubtful validity for want of a proper ceremony; for, in validating some only by the partial operation of the Act, they by implication invalidated all others depending upon a like ceremony.

As to the essentials of marriage, we may, however, regard it as reasonably certain, but for the Statute

(*d*) 14 U. C. R. 604.
(*e*) 15 U. C. R. 287.
(*f*) 21 U. C. R. 352.

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under review, that the Ecclesiastical Law of marriage was not in force at that time, and that there was in fact no such thing as canonical disqualification affecting the inhabitants of Upper Canada. Giving the expression its colloquial signification, however, what is the effect of the Act? Before its passage (and still, as we contend), a Parson might have celebrated a marriage between any two persons without regard to affinity or consanguinity. Any marriage so solemnized, whether canonical or not, would, according to the interpretation of the Act apparent from the preamble, have been perfectly valid, the required ceremony having been duly performed; and, moreover, such marriages were unaffected directly by the Act. It did not affect directly, and was not intended to affect, marriages which had been, or might thereafter be, celebrated by Parsons. Such marriages would therefore have been as valid after as before the Act, whether canonical or not, but for the theory that the Canon Law was thereby adopted by implication. If we look upon the limited operation of the Act as to existing marriages, and upon the restrictions thereby imposed upon the future labours of magistrates, as an interpretation by the Legislature that the Canon Law was part of the law of Upper Canada, all uncanonical marriages (if any) theretofore celebrated by Parsons, would have been made voidable by its *ex post facto* operation. The effect would be to invalidate for a cause not in the direct contemplation of the Legislature, those very marriages which had been brought into existence, by the performance of those very ceremonies the want of which in other cases the Act was intended to supply. But no such effect was intended by the Legislature, for the preamble expressly defines and limits the intended operation of the statute to the solemnization of marriages. Its aim was directed towards illegal marriages; but their illegality sprang not from the so-called canonical disqualification, but from the want of a proper ceremony. If, however, we reject this theory, and adhere to the strict wording of the statute, the result of its effect upon the enabling clause is curious. This clause empowers Justices of the Peace to celebrate marriages between persons not under *can-*

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onical disqualification. Before the Act, Parsons were the only persons authorized to celebrate marriage; and, as we have shown, they could legally celebrate them without regard to consanguinity or affinity. The Act empowers another particular class of persons, viz., Justices, to celebrate marriages between a particular class of persons, viz., persons not under canonical disqualification. Marriages which might be thereafter celebrated by Parsons, were left untouched. The Act does not extend to all marriages, nor to the validity of the marriage contract generally, but its aim is directed to the person who may officiate, and his qualifications, though it limits the field of his prospective labours to canonical marriages. If we follow the strict wording of the Act, and hold that marriages by Parsons are not affected, the effect is peculiar. Persons contemplating matrimony would be judged by different laws according as they appeared before a Magistrate or a Parson; and the strange anomaly would exist, that a Parson might legally create an uncanonical and incestuous marriage, while a layman could not do so. The result is that, if we adopt this theory that the canon law came into force by the implication of this Act, it works injustice by its *ex post facto* operation, and its limited scope is extended and enlarged so as to embrace marriages not intended to be directly affected by it; while, if we adhere to the strict verbal construction of the Act, it produces an anomaly. The only escape from this position, and the only way to produce harmony in the constitution and laws, is to reject wholly the assumption that the Canon Law is in force, and regard it as a mistake of the Legislature to suppose that a marriage in order to be legal must have been canonical. The question before us is whether or not the implication contained in this statute is a strong enough one to render such a course absolutely impossible, and to warrant us in saying that the Canon Law must be in force by the interpretation of the Legislature. In arriving at a conclusion, we must throw upon the Act the light of the general policy of our Colonial Legislation; we must contrast it with other Provincial statutes affecting ecclesiastical matters; compare it with kindred cases, and

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look at the opinions of Judges upon the general question of the existence of ecclesiastical laws in Upper Canada.

Without yet regarding any of the future legislation upon the subject, let us compare it with the Statutes of Mortmain.

The Church Temporalities Act (*g*) provided, amongst other things, that lands might be conveyed to the use of the United Church of England and Ireland in Upper Canada, "the Acts of Parliament, commonly called the Statutes of Mortmain, or other Acts, laws, or usages to the contrary thereof notwithstanding;" and it further declared that the conveyance should be executed six months before the death of the donor, and registered within six months afterwards. In *Doe dem. Anderson* v. *Todd* (*h*), Sir J. B. Robinson after holding that the Statutes of Mortmain were unsuited to this country, proceeds:—"The Legislature, it is admitted, are the best interpreters of their own laws. * * They have provided that lands may be conveyed to such uses for the benefit of the United Church of England and Ireland in this Province as would clearly have been prohibited by the British Statute of 26 Geo. II. cap. 36, and thus have shown it to be their understanding, that without such express legislative authority, the English Statutes of Mortmain would have restrained parties from making such a disposition, for they have added the words, 'The Acts of Parliament, commonly called the Statutes of Mortmain, or other Acts, law or usages to the contrary thereof notwithstanding.' * * If we were to hold that the Statute in question is not in force, then this incongruity would follow, that while people would be restricted from conveying lands to religious and charitable uses connected with the Church of England, in any other manner than by a deed made six months before the death of the grantor, and registered within six months after, they might convey these lands to religious and charitable purposes connected with any other denomination of Christians without any restriction whatsoever.'

(*g*) 3 Vict. cap. 74.
(*h*) 2 U. C. R. at pp. 88, 89.

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In order to prevent this anomaly the Court held that on account of the interpretation of the Legislature, which implied the existence in force of the Statutes of Mortmain, they must be held to be in force.

There are points both of similarity and of contrast in these two cases. In the marriage case a strict construction of the words of the Act would produce an anomaly evidently never intended. The same, as to the Mortmain case. So far they stand together. In the latter case the Legislature enables the Church to take conveyances of real property in a certain prescribed manner. In the former it enables certain persons to celebrate marriages with certain restrictions as to whom they marry. In the latter case the enabling clause is put in force, *notwithstanding* the Statutes of Mortimain or *other* law to the contrary, (and we may add as implied by the Legislature,) which would, in the absence of this enactment, have prevented such conveyances from being made. The use of the expression "or *other* law to the contrary," shows conclusively that the Legislature supposed the Statutes of Mortmain to be a law to the contrary of the provisions of the Act. In the marriage case the enabling clause mentions no adverse law, but simply limits the field of operations of those enabled to perform the ceremony of marriage. Any conveyance to the use of the Church of England not complying with the formalities prescribed in the restricting clause of the Church Temporalities Act, would be void. Any marriage celebrated by a Magistrate between persons canonically disqualified would, perhaps, have been void (*i*). And the reason in the first case is that a law to the contrary of the Act was supposed already to exist which would operate to invalidate the deed; in the second case, the reason is that, by the Act itself, the newly created powers of the Magistrates were limited, and did not extend far

(*i*) It may be an arguable point whether they would have been void or (supposing such things could have been in Upper Canada) voidable only. Such acts were afterwards made punishable by the 2 Geo. IV. cap. 11. The offence would be that of the celebrant, not that of the contracting parties. But for the purposes of our argument we give the fullest operation to the Act that could be claimed for it.

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enough to enable them to create such marriages. And the reason, again, for the limitation of their powers may have been one of two. It may have been either because the Legislature supposed that the canon law already obtained, and that the operations of Magistrates should be confined within the same limits as those of Parsons; or the reason may have been that the Legislature, being convinced of the safety of marriages in the hands of Parsons, who were bound already by the canons of their church not to marry persons within the degrees thereby prohibited, were content to leave such marriages untouched, but imposed upon Magistrates the same restrictions which the *Church* imposed upon its Parsons. Now, taking the latter view, the law would be left unchanged and free from doubt; and when the Statute became effete through effluxion of time and the increase in the number of parsons and ministers, the limitation *ad hoc* imposed as to marriages celebrated by Magistrates would cease with the expiration of their powers, and the law, as we have sketched it before this Act, would have resumed its normal state. If, however, this construction must be rejected as savouring too much of refinement, we must adduce as the reason for the restriction, the supposition of the Legislature that the Canon Law was in force.

So far the two cases appear to stand or fall together. But from this point the analogy is less perfect, and the cases begin to diverge. The assumed existence of the Statutes of Mortmain was the *raison d' être* of the Church Temporalities Act itself, and its direct object was to relieve from their effect as supposed existing law. The assumed existence in force of the canon law was not the cause of the passing of the whole of the Marriage Act, but was the cause of the imposition of the restriction upon Magistrates only, which was shaped upon the lines of supposed existing law; while the cause of the passing of the Act itself was the useless ceremonies that had been performed by laymen, and its direct object was to validate them. The existing law there to be relieved against was a law affecting the ceremony of marriage. The origin of

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the Church Temporalities Act lies in the supposed existence in force of the Statutes of Mortmain, against which it was intended to relieve; and, by implication, that against which it was intended to relieve, namely, the conveyance of land to church uses was illegal. The origin of the Marriage Act lies in the supposed existence of that branch of the law, to wit, the civil law of marriage, against which it was intended to relieve; and by implication that against which it was intended to relieve, viz., the celebration of marriages by Magistrates was illegal. The Church Temporalities Act would be insensible without the assumption accorded to the Legislature, even if the saving words were struck out. It would have no basis. The evil to be remedied would not be apparent, would not exist. The Marriage Act, on the contrary, would be perfectly sensible without the assumption that the Canon Law was in force; though it would be insensible, if it were held that the civil law of marriage was not in force at the time of its passing. It would be perfectly sensible if the restrictive words relating to canonical disability were struck out; and they might be struck out without danger, for without them the Act could not be construed as authorizing Magistrates to celebrate marriages contrary to the existing laws. The Act would have the same basis without the assumption that the Canon Law was in force as with it. The evil to be remedied would still be apparent. The basis of the Act would still remain, viz., a defect in the civil law of marriage.

To hold that the Canon Law is in force by the indirect effect of this Act, would be to introduce discord into our constitution and the laws in force by virtue thereof; for we must not lose sight of the fact that, even if the Canon Law had been adopted, beyond doubt there exists no jurisdiction to enforce it. We must recollect, too, that it was the instrumentality of the Ecclesiastical Courts in England that gave vitality to the ecclesiastical law of marriage; and without this jurisdiction in Upper Canada it would remain quite dead and inoperative. The existence of some spiritual jurisdiction is essential to the existence of the laws themselves. On the other hand, to reject the assumption of the Legisla-

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ture that the Canon Law was in force, as a clear mistake; or, to limit the operation of the Act strictly to the persons and marriages named therein, would be to leave undisturbed the undoubted characteristic principles of our constitution, and the laws existing thereunder, according to Sir Wm. Blackstone's opinion, as explained and confirmed in *Atty.-Gen'l* v. *Stewart* (*j*), and *Doe dem. Anderson* v. *Todd* (*k*). And it is clear that a plain mistake of the Legislature, or an erroneous declaration of existing law, is wholly inoperative (*l*). There is no difficulty in administering the law under the Statutes of Mortmain. Being merely real property Statutes, questions arising under them are daily decided in the Civil Courts. The ecclesiastical laws, on the contrary, cannot be so administered, and were never intended to have been administered at all, if we take the further opinion of the Legislature upon the point.

And here we may notice other Provincial Statutes inconsistent with the theory that the Canon Law is in force, but consistent with the general colonial policy as to ecclesiastical matters, which we shall also presently notice.

In the first place, the Church of England is no part of the constitution of any colonial settlement (*m*). The canons have no force *proprio vigore*, and the Legislature has never imposed them upon us as law, nor furnished any instrumentality by means of which they have acquired any general operation. Indeed, so fearful were the Parliament of Upper Canada of the growth of an ecclesiastical jurisdiction, accompanied of course by ecclesiastical laws, that they expressly enacted in the 18th section of the Church Temporalities Act that "nothing in this Act contained shall extend, or be construed to extend, in any manner, to confer any spiritual jurisdiction or ecclesiastical rights whatsoever upon any Bishop or Bishops, or other ecclesiastical person of the said Church, in the said Province of Upper Canada."

(*j*) 2 Mer. 144.
(*k*) 2 U. C. R. 82.
(*l*) *Wilberforce*, p. 13 *et seq.*
(*m*) *In re Lord Bishop of Natal*, 3 Moo. P. C. N. S. 148.

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When we recollect the fact that, in England, the ecclesiastical laws of marriage were dead and inoperative before a Civil Court without the active exercise of spiritual jurisdiction; in other words, that the existence of a spiritual jurisdiction was absolutely essential to the very existence of the ecclesiastical law of marriage; and when we find our Provincial Legislature expressly providing against the possibility of the growth of a spiritual jurisdiction, is it not a fair and forcible argument that the Legislature never intended that the Ecclesiastical Laws of England should ever be adopted or administered here?

Nor did a like jurisdiction exist elsewhere in Upper Canada. By the C. S. U. C. cap. 10, sec. 3, the Superior Courts possessed the same powers and authority as by the law of England are incident to a Superior Court of civil and criminal jurisdiction; and they were to hear all manner of actions, causes, and suits, as well criminal as civil, real, personal and mixed, in as full and ample a manner as at the time the Act took effect, could be done in Her Majesty's Courts of Queen's Bench, Common Bench, or in matters regarding the Revenue, by the Court of Exchequer in England. The jurisdiction of the Court of Chancery was also limited by the Chancery Act, C. S. U. C. cap. 12, sec. 26, to the powers which were possessed by the Court of Chancery in England in its general jurisdiction on a certain date. The jurisdiction of the English Temporal Courts, by which that of our own Courts is tested, was touched upon in our first paper (*n*). But their powers are so well summed up in *Rogers'* Ecclesiastical Law (*o*), that we transcribe the passage. "A void marriage arising out of civil disabilities may be questioned in any proceeding, collaterally as well as directly; and in any Court, Civil, Criminal, or the Court of Chancery, or in those Ecclesiastical Courts which properly have no jurisdiction in matrimonial questions; in all of these the validity may be tried as an incidental matter. Thus, in the Prerogative Court of

(*n*) *Ante*, p. 521, *et seq.*
(*o*) Ed. of 1840, p. 550.

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Canterbury, whose authority extends to testamentary causes only, it frequently becomes necessary to determine the validity of a marriage; 1 Add. 65; 2 Phill. 760; in the inferior Courts of Quarter Sessions upon cases of settlement, in Criminal Courts in cases of bigamy, and in committees of privilege in the House of Lords. But a marriage voidable only, cannot be collaterally disputed in the Temporal Courts; those Courts, it is apprehended, having no jurisdiction in matters purely spiritual. * * But, although the Courts of Common Law have the power of determining on the validity of a marriage when that question arises incidentally for their decision, and, in some cases, upon a direct and distinct issue, as, for instance, in cases of dower, it is the Ecclesiastical Court alone which has the power of pronouncing a binding and effectual judgment on the legality of a marriage." Just so circumscribed as this are the power and jurisdiction of our Provincial Courts. Our Provincial Statutes would appear then to have most effectually excluded from Upper Canada all spiritual or ecclesiastical jurisdiction. And those who contend that the Legislature intended that the Canon Law should be, or understood that it was, in force in Upper Canada, are driven to the position that, if it was so understood to be in force, it was certainly never intended that there should be any Court, Spiritual or Temporal, having jurisdiction to administer it.

To turn from a particular instance to the general policy of the Legislature upon ecclesiastical and religious matters. The C. S. C. cap. 74, has the following preamble:—"Whereas the recognition of legal equality among all religious denominations is an admitted principle of Colonial legislation; and whereas, in the state and condition of this Province to which such a principle is peculiarly applicable, it is desirable that the same should receive the sanction of direct legislative authority, recognizing and declaring the same as a fundamental principle of our civil policy." The Act then guarantees the free exercise of religion and worship, and proceeds to enact that no rectories, according to the establishment of the Church of England, should be thereafter

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erected. This being not only the policy but a principle of our Colonial Legislation, it would require more than an implication or supposition, or indirect expression of, the Legislature as against its express enactment, to give a preference to and erect into the law of the Province, the canons or rules of a voluntary religious association, which, on an admitted constitutional principle, stands upon a legal equality with all other like bodies. It may be answered that the canons have greater authority than the rules of other denominations, by reason of their being incorporated into the Ecclesiastical Common Law of England. But the reply to this is that the Church of England and its canons came to this Province shorn of any prestige, and devoid of any legal entity, which they may have had in England. They were lopped off the constitution which we received, and we took the Common Law without them; and it would require an express enactment of the Legislature, not to reinstate them, but to originate them or to give them any *status* whatever in our constitution and laws. For every infringement upon, or abrogation, alteration, or amendment of the Common Law, must be express and undoubted (*p*). It has never been the policy or definitely expressed intention of the Provincial Parliaments to subject the inhabitants of Upper Canada to the canons of a State Church; but, on the contrary, by the 18 Vict. cap. 2, C. S. C. cap. 25, sec. 4, all semblance of connection between church and state was removed. And by no law are we subjected to any restrictions, founded upon difference of opinion or belief, in respect of religious and ecclesiastical matters. This is agreeable also with the opinion of the Legislature, as expressed in the preamble to the 20 Vic., cap. 68, which recites that "under the laws now in force, privileges are claimed with regard to the solemnization of matrimony by the clergymen and ministers of certain denominations, which are partial in their character, and offensive to certain other religious denominations, and their clergymen and ministers?" Power is then given to all clergymen and min-

(*p*) *Kraemer* v. *Glass*, 10 C. P. at p. 475, per Draper, C.J.; *Crowe* v. *Steeper*, 46 U. C. R. 87, per Hagarty, C.J.

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isters of all denominations and churches to celebrate marriages according to the rites, ceremonies, and usages of such churches respectively. The different sects might differ as to their usages with respect to the degrees of consanguinity and affinity. In fact, they do differ very widely upon the debatable and debated ground of the right to marry with a deceased wife's sister. As we read the intention of the Legislature, their ministers are to be left to the free exercise of the right to celebrate marriages according to their several and respective religious usages, which, being interpreted, signifies that their conscientious interpretations of the bases upon which they build their several and respective religious views and usages, are not to be interfered with so long as they be not made an excuse for licentiousness. If, therefore, a marriage perfectly unobjectionable according to their profession and usages, be obnoxious to the canons of the Church of England, is it to be submitted to the test thereof, in order to its validity? Are these canons the doctrine of an Appellate Court by which the parties must be judged, after having followed the legally justified usage of their own denomination? Plainly not, unless the Church of England and its canons are to be placed in a position of legal supremacy which has been absolutely denied them. To give power to the various denominational ministers to celebrate marriages according to their respective usages, and then to subject them to the influence of the Canon Law, would be to outrage the policy of the Legislature, as expressed in the preamble to the 20 Vict. For this exaltation of one religious body over another would be partial in its character, and offensive to the other religious denominations.

If we are to look upon the Legislature as the best interpreters of their own laws, they have given no uncertain sound as to their policy with respect to ecclesiastical jurisdiction and the status of the Church of England in Upper Canada. So much for the opinion of the Legislature.

We must add to this a very positive and unequivocal opinion upon the subject of ecclesiastical laws, expressed by a very eminent Judge four years after *Hodgins* v. *McNeil*

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was decided. We refer to *Lyster* v. *Kirkpatrick* (*q*), where Draper, C.J., says, "That the laws of England, under which ecclesiastical Courts are constituted, and ecclesiastical jurisdiction is administered in such Courts, forms no part of our law I fully admit, as I do that the Church of England has no legal status or privilege in that character differing from that of the Church of Scotland, or any other body or denomination of Protestants in this Province. * * The question in this case is one of right to property claimed in a character sanctioned by the 31 Geo. III. cap. 31, and within the limitations of that Statute the question must be decided according to that rule." The question involved was as to the rights and powers of rectors, and the validity of a lease made by a rector; and it was argued that the ecclesiastical law of England affecting rectors and their glebes or endowments, was not in force. The learned Judge freely admits this, but points out that the law affecting rectors' leases is a law of property; and a claim in respect of the same brought before a Civil Court for adjudication is a civil right, and that in both aspects a rule of decision had been provided by the Constitutional Act.

So far, our criticism has been confined to the first Provincial Marriage Act. Its provisions with respect to the matters we have been discussing, are the most important of all the Provincial Statutes; but our remarks so far as the understanding of the Legislature goes, apply equally to those that follow it, which we shall now notice. If any doubt was engendered by the expressions used in the first Act, they are perhaps increased by the indiscriminate use of the words "legal" and "canonical" in speaking of the qualifications of proposing contractors.

The next Act affecting the question was the 38 Geo. III. cap. 4, which extended the operation of the 33 Geo. III. cap. 5, and enabled ministers of the Church of Scotland, Lutherans, and Calvinists, to marry any two persons, neither of whom was under *legal* disqualification to contract matrimony. The 59 Geo. III. cap. 15, has no application.

(*q*) 26 U. C. R. 217, at p. 224.

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The 2 Geo. IV. cap. 11 (first session), was passed for the more certain punishment of persons illegally solemnizing marriage within the Province, and provides for the punishment of ministers who should celebrate marriages without license or publication of banns. The 11 Geo. IV. cap. 36, validated all marriages between persons not under *canonical* disqualification to contract matrimony, and declared the parties to such marriage, and the issue thereof, to be entitled to all the rights, and subject to all the obligations, resulting from consanguinity. Nothing in this Act is to extend to make valid any marriage illegally solemnized when the parties to such illegal marriage, or either of them, have subsequently contracted matrimony according to law. Future marriages might thereunder be celebrated by Presbyterians, etc., between persons, neither of whom was under any *legal* disqualification. The 10 and 11 Vict. cap. 18, extended this right to ministers of all denominations. The 12 Vict. cap. 90, and the 18th Vict. cap. 58, have no application. The 18 Vict. cap. 129, declared valid the marriages of all persons not under *canonical* disqualification, contracted in Upper Canada before ministers who had obtained licenses from the Quarter Sessions. The 20 Vict. cap. 66, as consolidated in C. S. U. C. cap. 72, sec. 11, declared that *every* marriage solemnized between Quakers, according to their rites, should be valid. By the Consolidated Statutes, the law is finally declared to be that the ministers of every denomination, duly ordained, may, by virtue of their ordination, according to the rights and usages of their respective denominations, solemnize the ceremony of marriage between any two persons, not under a *legal* disqualification to contract such marriage. Provision is then made for licenses, returns of marriages, etc. The first section of this Act has been perpetuated in the Revised Statutes of Ontario, cap. 124, sec. 1.

Nothing can be clearer upon a perusal of these Statutes, or even of their preambles, than that they were entirely ceremonial in their aim. The evil to be remedied, which was the lack of the properly authorized persons to perform the ceremony of marriage gives its complexion to the whole of

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this legislation. This is peculiarly the civil law of marriage, and it is with the civil law of marriage only that the Legislature professed to deal. The implication, if implication there be, that another entirely distinct branch of the marriage law was incidentally adopted, and is in force, must arise upon a consideration of all these Acts, which are *in pari materia*, and its value is considerably impaired when we look at their *raison d'être*. It will have been noticed that in the Statutes subsequent to the 33 Geo. III. the invariable practice has been to validate prior *canonical* marriages, and to enable the persons therein named to celebrate marriages in future between persons not *legally* disqualified. This is continued to the end. A man already married is under a *legal* disqualification to contract matrimony. Other legal disqualifications or civil disabilities are idiocy and want of age (*r*). A legal marriage is not necessary a canonical one, but may be incestuous. When the Legislature gives power to certain persons to celebrate marriages between persons not under *legal* disability, and *thereafter* confirms prior existing marriages between persons not under *canonical* disqualification, they either utterly disregard the distinction, or else they use "legal" as implying "canonical." The illegality, however, constantly in the view of the Legislature in passing these Statutes was illegality on account of something wanting or occurring in the solemnization, the formal requisites, of marriage. This is well exemplified by the 11 Geo. IV. cap. 36, which provides that nothing in the Act contained "is to extend to make valid any marriage illegally solemnized when the parties to such illegal marriage, or either of them, have subsequently contracted matrimony according to law." This clause is plainly based upon the assumption that the illegality of the "illegally solemnized" marriage rests upon the manner of the solemnization; for the Act was passed to substitute a certain ceremony for a doubtful one; and it incidently provided against validating the former marriage of those persons who had married others, believ-

(*r*) *Rogers*, Eccl. Law, Ed. of 1840, p. 549.

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ing the first ceremony between themselves to have been illegal and insufficient to constitute a valid marriage. It could hardly be argued that the Legislature intended to provide against validating a marriage illegal on account of canonical disability, if either of the parties had married again according to law; for by the law of England, at the time of the Constitutional Act, either of the parties to a marriage, uncanonical but undissolved by the Ecclesiastical Courts, would have been guilty of bigamy if they had married again in the lifetime of their consort (*s*). If the Statute had in view illegality on account of affinity or consanguinity, or other canonical disqualification, it would be insensible as providing against operating to validate that which was already valid.

All that we have hitherto said respecting our first Marriage Act applies with equal force to the argument to be deduced from these Statutes that the Canon Law is in force by implication. But we may add thereto a consideration evolved from an examination of the meaning of the phrase, "not under *legal* disability." This word "legal," it will have been noticed, was first used by the Legislature, in this connection, in the Act 38 Geo. III. cap. 4, which is the first statute giving power to ministers of other religious bodies than the Church of England to solemnize matrimony. Was there a purpose in this, founded upon the general policy of colonial legislation? Did the Legislature consider that it would be partial and offensive to give power to the various ministers to celebrate marriages, and then to insist upon their observance of the table of degrees to be found in the Book of Common Prayer? And did they, therefore, in their enabling clauses use the word "legal" instead of "canonical with the view of avoiding this?" Considerable doubt, it must be admitted, is thrown upon this by the fact that, in the very next Act, all previous marriages are validated, provided they were *canonical*. But such an expression does not appear in the 20 Vict. cap. 66, and the word "legal" therein carries its full signification.

(*s*) *R.* v. *Chadwick*, 11 Q. B. 173.

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It remains for us to notice the peculiar wording of the first part of the 11 Geo. IV., cap. 36, which validated prior canonical marriages. It declared that the parties thereto, and the issue thereof, should be entitled to all the rights, and subject to all the obligations, resulting from *consanguinity*. The same clause appears in the first Marriage Act, the 33 Geo. III. cap. 5. Its meaning is by no means clear. A man, immediately upon marriage, acquires no rights or obligations resulting from consanguinity, that he had not before; although he may in the future have some consanguineous relatives that were wanting before marriage. And, we presume, his issue would have had all the civil rights, and been subject to all the civil obligations, resulting from their consanguineous relationship to others of their family, without the aid of this clause. The validity of their parents' marriage would have given them these rights, and imposed these obligations, whatever they might be. The words are not, by any means, so full of signification as to warrant the inference that the parties to the marriage, and their issue, should thereby come under restrictions as to future marriages, on account of the consanguinity, or affinity, between them, and certain others resulting from this marriage.

It is much to be regretted that the discussion upon these statutes is not reported in *Hodgins* v. *McNeil*, and that His Lordship did not express his views upon them; especially so, as we find two weighty opinions of other Judges of Upper Canada, the one opposed to the view that the Ecclesiastical Laws are in force here, the other ascribing a much less comprehensive effect to the Marriage Acts than that expressed by Esten, V.C. We refer to the opinion of Draper, C.J., in *Lyster* v. *Kirpatrick* (*t*), as the one; and the other is that of Sir J. B. Robinson in *R.* v. *Roblin* (*u*). Referring to these very Acts, His Lordship says, immediately following the passage quoted *ante*, p. 578, "The Legislature of Upper Canada have regarded this matter, as appears by the Statutes 33 Geo. III. cap. 5, secs. 1, 3

(*t*) *Supra.*
(*u*) 21 U. C. R. 352 at p. 355.

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and 6; 38 Geo. III. cap. 4, sec. 4; and 11 Geo. IV. cap. 36, in which they have recognized the English Marriage Act in effect, though not in express terms, as having the force of law here in a general sense, and controlling the manner in which marriage is to be solemnized." This is a much more restricted opinion than that of Esten, V.C. The latter thought that the 38 Geo. III. presupposed the Canon Law to be in force. Sir J. B. Robinson thought that it recognized in a general way only the English law affecting the formal requisites of marriage, *i.e.*, the Civil Law of marriage.

Against the opinion of Esten, V.C., that the Legislature presupposed the Ecclesiastical Law of marriage to be in force here, there are ranged, the general policy of the Legislature, giving force to a principle of our constitution by the expulsion from all legal recognition and supremacy of every religious body, and consequently of their canons and rules; the unmistakeable expression of their will that no ecclesiastical jurisdiction should gain a footing in Upper Canada, without which ecclesiastical laws would be dead; the irresistible inference that they never intended to adopt the Canon Law, from their having expressely provided against introducing the means whereby it should be administered; the unequivocal expression of opinion by Draper, C.J., that we are subject to no ecclesiastical laws; and the opinion of Robinson, C.J., narrowing the effect attributed to the Provincial Marriage Acts, mentioned by Esten, V.C., to the recognition of the civil law of marriage only. And to this overbalancing weight of authority effect must be given.

If our conclusions are correct, we find ourselves an example of the suppositious case stated by Lord Cranworth, in *Brook* v. *Brook* (*v*), of "a Christian country, in which there are no laws prohibiting marriages within any specified degrees of consanguinity or affinity, or declaring or defining what is incest." What then is the duty of the judiciary, where the validity of the marriage is brought in issue? His Lordship continues:—"Still, even there, inces-

(*v*) 9 H. L. C. at p. 238.

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tuous marriages would be held void, as polygamy would be held void (*w*), being prohibited by the Christian religion. But then to ascertain what marriages are, within that rule, incestuous, a rule not depending on municipal laws, but extending generally to all Christian countries, recourse must be had to what is deemed incestuous by the general consent of Christendom. It could never be held that the subjects of such a country were guilty of incest, in contracting a marriage allowed and approved by a large portion of Christendom, merely because, in the contemplation of other Christian countries, it would be considered to be against God's law." The difficulty of administering principles as broad as these are almost insuperable. God's law and the Christian religion have so many differing exponents, and some doubtful or debateable marriages occasion so much dispute amongst eminent theologians, that it would be impossible to arrive at any general consent of Christendom upon the very questions which require it the most. The marriage of first cousins is considered incestuous by the law of Spain (*x*), though not so by the law of England. The marriage of a man with his deceased wife's sister is held to be incestuous by the law of England. Yet many Christian countries consider this alliance not to be contrary to God's law. There is, therefore, no general consent of Christendom that these alliances are prohibited by the Christian religion. Paraphrase Lord Cranworth's dictum, and apply it to this. "It could never be held, that the inhabitants of Upper Canada or Ontario were guilty of incest, in contracting a marriage (say with deceased wife's sister) allowed and approved by a large portion of Christendom, merely because, in the contemplation of other Christian countries (say England), it would be considered to be against God's law." And our Courts, in the absence of a municipal law, would have to hold that, as there was no general consent of Christendom that such a marriage is incestuous, it must therefore be valid. And so, the rule laid

(*w*) This is hardly a correct expression. Polygamy is *unlawful*. Bigamy is a crime. A polygamous or a bigamous *marriage* is void.

(*x*) *Sottomayer* v. *DeBarros*, 37 L. T. Rep. 415.

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down by the learned and noble lord, would lead us to a conclusion different from that which has been reached by the Courts Christian of his own country. Such a principle of decision would be attended by a very obvious inconvenience. Different Judges might hold different views as to what Christendom was agreed upon; and the adjudication of the first Judge, whose authority might be invoked for an interpretation of the law, would form a precedent in the Municipal Law of his country, which the next Judge of co-ordinate jurisdiction would feel himself bound to follow, notwithstanding any differences of individual opinion that might exist between them. And thus, the understanding and interpretation of a Judge of the general consent of Christendom, would become crystallized into a principle and become too deeply imbedded in the mosaic of the Municipal Law of his own country, to be disturbed even by a universal revulsion of opinion in the civilized world.

If the case be put solely upon the ground of Christianity, it appears to be a case in which the Courts could not interfere. Though Christianity is part of the common law of England, it is not the province of any Court of Justice to interfere with differences of opinion (*y*). It is just upon those doubtful points, with regard to which differences of opinion exist, that we require some certain law. How then should a Civil Court proceed? It has been said that the Statutes of Henry VIII., which professed to enact "God's law" upon the subject, are such an expression of opinion by the Parliament of what God's law is understood to be, that they should serve as interpretations of the expression when it is again used in respect of the degrees of marriage. But there is a later Parliamentary expression of opinion as to what God's law is in the 1 Mary, cap. 1, which conflicts with the Statutes of Henry VIII. as to marriage with deceased wife's sister. The Statute of Mary expressly repeals the 28 Henry VIII. cap 7, or any other Act whereby the marriage of Queen Katharine with Henry VIII. is declared to be against the word of God or unlawful, and

(*y*) *Pringle* v. *Napanee*, 43 U. C. R. 285, and cases cited.

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enacts that the marriage in question is to be "adjudged to be and stand with God's law."

It is true, that the Statute of Mary was passed with a private purpose of the Sovereign in view. But so also were the Statutes of Henry VIII., and, if we are to choose between them, the purpose of Mary's Statute was the more laudable one (*z*). And, we beg leave to add to this, Vice-Chancellor Esten's expression of doubt as to such marriages being contrary to God's law, notwithstanding the Statutes of Henry. In the absence of the supposed binding effect of these Statutes, his Lordship would probably have given the benefit of the doubt in favour of the marriage in question before him. There is, therefore, no guide in the general consent of Christendom so certain as to be worthy of being followed in all cases in the administration of municipal law.

The difficulties which the Temporal Courts would have in deciding such matters, are vividly depicted by Lord Denman in *R.* v. *Chadwick* (*a*). "It has been argued here," says His Lordship, "that the Judges of the Common Law Courts, who may now be called upon to decide these questions, must take their rule from the Scriptures. But what Scriptures? If I am called upon to determine what the law of God is, am I to be bound by what a particular translation tells me? We have been occupied here by a discussion of five days, in which as many different interpretations have been put upon the text under dispute. If any end could be put to such controversies, it would be by calling upon the Spiritual Courts to decide them, only leaving it to a Common Law Court to interfere, if it become necessary, by prohibition. Are we to talk here of the opinions of the Scribes and Pharisees? To sit as a Court of Error from the Karaites and Talmudists? To enquire into the doctrine of the Council of Eliberis? These are curious points and may occupy men of leisure; but for us to decide upon them would be doing the very thing which the Legislature intended to prevent,

(*z*) *R.* v. *Chadwick*, 11 Q. B. 173, at p. 178.
(*a*) 11 Q. B. 173, at p. 232.

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when it took upon itself to determine what were the prohibited degrees." And Coleridge, J., at p. 238, said, "If it were necessary for the right interpretation of these terms ("God's law," "Levitical degrees") used in a statute to examine into the 18th chapter of Leviticus, we must do so, however painful the enquiry might be on such an occasion; but we could not be assisted in it by any criticism on the now authorized version of the Bible, for it did not exist when the 32 Hen. VIII. cap. 38, was passed."

Indeed, if one of our own Courts should have incidentally brought in issue before it, the validity of a marriage which was questioned upon canonical grounds, and notwithstanding the difficulties which we have pointed out, should come to a conclusion upon the validity of the marriage, could judgment thereupon be pronounced? They might pronounce an opinion, but they could not annul the marriage. They could not, as *Rogers* says, "pronounce a binding and *effectual* judgment on the legality of the marriage." Since none but civil questions can come into controversy before our Courts, the validity of a marriage can only be raised incidentally before them; and the Court, though it might pause to express an opinion upon the validity of the marriage, would yet be bound to proceed with the main object of the suit, and hold the marriage good for all civil purposes. This is clearly pointed out by *Rogers* in a note to the passage we have already quoted. He says, "Generally speaking, as the question of marriage arises only incidentally in the Temporal Courts, it is sufficient to prove a marriage *de facto*. If, however, a distinct issue be raised on the legality of marriage, as it may be by a plea of *ne unques accouple en loyal matrimonie*, a legal marriage must be proved, though in that case a legal marriage in fact would, it is conceived, be sufficient, though it may be a marriage voidable in the Ecclesiastical Courts" (*b*). So in a case of alimony, where the validity of a marriage might be put directly in issue, the Court could not, it is conceived, avoid the marriage and separate the parties. If not, then the parties

(*b*) Eccl. Law, Ed. of 1840, p. 550, note.

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would remain man and wife; and the wife would, notwithstanding any adverse judicial opinion as to the validity of the marriage, be entitled to alimony as one of the civil rights (to use Chief Justice Robinson's expression) which as an inhabitant of Ontario she might claim as a wife (*c*). If the Court could not pronounce any binding or effectual judgment upon the parties, it is manifest that it could not pronounce any judgment at all upon the legality of the marriage, where it comes incidentally in question; and it must be conceded that no action having for its main object the dissolution of a marriage, could be instituted in any of our Courts. What course, other than that suggested by us, Vice-Chancellor Esten would have pursued, holding the opinion that he did, if the validity of such a marriage as that in *Hodgins* v. *McNeil* had been called into question before him in the lifetime of the parties, it is difficult to conceive. The inevitable course for a Civil Court to pursue is very plainly indicated at p. 243 of the report of *R.* v. *Chadwick*, to which we have referred so often. This was a prosecution for bigamy after the passing of the 5 & 6 Wm. IV. cap. 54. Wightman, J., said, "If the case had arisen before the passing of the 5 & 6 Wm. IV. cap. 54, and a man had married his wife's sister, and afterwards had married another woman in the lifetime of the first wife's sister, the marriage not having been avoided in the Ecclesiastical Court, he would have been guilty of bigamy, the marriage being good; but if the marriage with the wife's sister had been annulled in the Ecclesiastical Court, because within the prohibited degrees, he would not be guilty of bigamy." This is, perhaps, as strong a case as could be put, and this is the law which was adopted by the Constitutional Act. There is here no question of setting aside the first marriage —there are no civil rights to be administered to any parties—there is a strong presumption of innocence in favour of the accused, which nothing but absolute proof of a previous marriage could override. If the marriages were unlawful, as Vice-Chancellor Esten has said, surely an in-

(*c*) *Ante*, p. 578.

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dictment for bigamy should be the occasion above all others upon which the Court should, if it had power, declare in favor of the invalidity of the marriage, and the innocence of the prisoner. The argument applies *a fortiori* to the trial of a civil cause, where the validity of a marriage is called in question.

This concludes our examination of the law of Ontario.

The result was foreshadowed in an early part of these papers. We have endeavoured to discover every source from which light might be thrown upon the subject, which is one of no little importance to the people of Ontario. It may be asked what protection is afforded against marriages, abhorrent to the feelings of civilized people, which possibly might be created under such a want of law. The protection offered is simply that afforded by the various religious bodies, who apparently have the matter entirely in their hands, and whose ministers are bound by the rules of their respective denominations, and by their duty as Christians, to withhold their services from persons contemplating such alliances as are, in their sound discretion, contrary to Christian teaching, as explained by their respective creeds.

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EDITORIAL REVIEW.

The Court of Appeal.

A discussion has been going on in England as to what are the elements of a perfect Court of Appeal. On the one hand, it is maintained that the greatest lawyers should be tempted into the Court of Appeal by large salaries and exemption from going Circuit. On the other hand, it is urged, with some plausibility, that, as an appeal under the present system, is a rehearing of the whole cause upon its merits, rather than a review of the application of limited questions of law to undisputed facts, among the qualifications of Appellate Judges are necessarily a "thorough, practical acquaintance with the course and incidents of trials." This is the ground upon which the advocates of this view of the subject rest their opinions that the Judges of Appeal should continue to go the Circuits, and, by contact with the incidents of trials, retain the skill necessary to examine the whole cause upon appeal. In reply to this, it is said that a man who has spent a large portion of his time in going Circuit, first as counsel, and then perhaps as a Judge, would hardly lose the skill and effect of his training because he has ceased in his latter years to act as a Judge of first instance. And again, by way of confession and avoidance, it is contended that, as questions of fact are argued and decided in the Court of Appeal almost as frequently as in the Courts below, the practice thought to be necessary by the advocates of Circuit going, is thus maintained.

What applies to the English Court of Appeal applies to our own.

For our own part, we think the opponents of Circuit going for the Judges of Appeal have the better of the argument, but not by virtue of their plea in confession and avoidance. It is true that questions of fact come frequently before the Court of Appeal, and that under our present system such appeals will be more frequent than heretofore, and

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that the skill employed by Judges of first instance will be necessary in sifting the whole case on appeal; but it seems to us the height of absurdity to say, that after a man has laboriously gone Circuit for years, and has earned the reward of a seat in the Court of Appeal, his knowledge of men and things, and his skill in discovering the truth of facts, will immediately filter through him, or run off like surface water, leaving him a dry man of cases. It appears also that the truth of the allegation that the Judges of Appeal are to apply themselves to and determine the facts of a case before the Court of Appeal as Judges of first instance, involves the truth, as a doctrine of appellate practice, of the proposition, that the case is to be heard in that Court upon the facts as it were undergoing trial for the first time. We think this unwarranted by authority. Though it has been held to be the duty of an Appellate Court to review, and, in fact, re-hear, the whole case upon its merits, yet it is not their duty to disturb the findings upon facts merely because they differ from the opinion expressed by the Judge of first instance. He is to be over ruled only when the Court of Appeal can demonstrate that he is wrong, not when they can prove simply that they can maintain a different opinion upon the same arguable state of facts. Great deference is still paid to the opinion formed by the Judge at the trial on account of the greater facilities which he possessed for enabling him to arrive at a conclusion.

If the working of the Judicature Act ever produces such a state of affairs as will allow of all cases being tried at one sittings, we see no reason why our Judges of Appeal should not be relieved from Circuit work. The Court of Appeal had to rise from its last sittings with a large amount of work in arrear, in order that the Judges might go the Circuits. At present, however, appearances indicate that no change will be made in the holding of assizes and sittings. Equity cases have been entered for trial at the assizes, and *vice versa*, and in each case the learned Judge presiding in his discretion directed that they should be tried as heretofore—the equity cases before an Equity Judge, and the common

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law cases before a Common Law Judge—a decision so savouring of sound sense, that no one having any of that commodity will find fault with it. So long as this practice is maintained, we shall have special sittings for cases assigned to the Chancery Division, and the services of the Judges of the Court of Appeal will be required upon the Circuits.

The Supreme Court Reports.

A correspondent complains, at another page, in a letter which we had not room to insert in our last number, that we have to wait full eighteen months for the reasons of the decisions of cases before the above Court. The result of a case reaches the profession at an early date through various mediums, of which we have endeavoured to become a useful one, but it is quite true that we remain in the dark as to the reasons of the decisions for a good while. Where the fault lies we cannot pretend to say, and so we cannot suggest a remedy. Our correspondent must recollect, however, that there are vast difficulties to be overcome, and that a great improvement has taken place since these Reports were commenced. Since the receipt of our correspondent's letter, the first number of volume five has been published. We notice that the most recent case reported therein was argued in November last, and judgment was delivered in February last. This brings the learned Reporter (who we believe was under the weather not long since) within the saving clause of our correspondent's letter.

Friendly v. Clarke—A Correction.

We have to correct an error which we made in reporting the above case at p. 614. Mr. Justice Osler did not decide that leave to serve short notice of motion on appeal cannot be obtained from the Master in Chambers.

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BOOK REVIEWS.

A Treatise on the Law of Sales of Personal Property, with references to the American decisions and to the French Code and Civil Law, by J. P. BENJAMIN, Esq., Q.C., of Lincoln's Inn, Barrister-at-law; third American, from latest English edition, by EDMUND H. BENNETT. Boston: Houghton, Mifflin & Company, 1881.

Benjamin on Sales is too well known to require any of its excellencies to be pointed out by a reviewer. The American editions are also well known, and have circulated widely among us. On such a subject the law is ever restless. As commerce increases and society varies, new complications arise and new points are decided by the Courts. The edition before us is not by any means lacking in late decisions. But it possesses a feature which has contributed not a little to the pleasure with which we have looked through it. The first thing that strikes one, is the great frequency with which Canadian authorities are cited. The familiar citations occur at almost every page. The fact that they are so largely quoted from, is evidence that they possess a cosmopolitan as well as a domestic value. Indeed, several well known Ontario cases are considered of sufficient importance to deserve places in the text. Once having obtained a place there, it is not likely that they will be readily dislodged. The cases we refer to are *Howell* v. *Alport*, 12 C. P. 375, and *Wiley* v. *Smith*, 1 App. R. 179, which take up several pages of the chapter on Stoppage in Transitu; and *Abell* v. *Church*, 26 C. P. 338; S. C., 1 S. C. R. 442, which serves to elucidate the law upon Breach of the Contract. Extracts from many other judgments appear in the notes, and minor citations are very frequent. Our perusal of part of the work, and verification of such references to authorities as we have been able to make, indicate that the latter have not been selected at random, but are cited with a purpose, and elucidate the

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points in support of which they are quoted. Indeed, the attention paid to our leading cases would be a sufficient guarantee of this.

We can confidently recommend this edition to the Profession in Canada, as having a peculiar value for them, and we do not hesitate to say that it is by far the best edition that has yet been published.

A Manual of Practice of the High Court of Justice for Ontario, under the Ontario Judicature Act, 1881, with the additional Rules of the Supreme Court of Judicature for Ontario, passed since the 21st August, 1881, and the Rules of the High Court of Justice, by GEORGE SMITH HOLMESTED, Registrar of the Chancery Division. Toronto: Rowsell & Hutchison, 1881.

Mr. Holmested has displayed a certain amount of temerity in this venture, inasmuch as he has adopted the plan of paraphrasing the Act—a proceeding which, from its very nature, involves, to a certain extent, the placing of a construction upon every clause. To become an arbiter, and say whether or not the views taken by the learned author are the correct views or not, would be to assume an unenviable and thankless position, and one requiring a good deal more temerity (in case of a difference in opinion) than that already suggested by us as possessed by the learned author. So far, the native productions have avoided placing constructions upon the Act, and this work is so entirely different in kind from any yet published in Ontario, that it furnishes still another aid to a study of the practice. It is the only Ontario publication so far, which professes to be a treatise upon practice. The valuable annotated editions of the Act are useful for reference, but are tiresome reading. This work may be read more easily because it treats of the practice in a consecutive narrative, so to speak. After a brief account of the Courts and their officers (including a table containing the names of local

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officers), the subject of parties to actions is taken up. The writ and ordinary steps in an action follow, and then comes a discourse upon the incidental proceedings. The tariff of fees, as lately promulgated, finds a place in the chapter on costs. The work is divided into twenty-four chapters, and contains a table of cases and a very good analytical index. A very useful feature is a table showing the pages at which any particular rule is cited. If the table of contents and index fail, a reference to the number of the rule in this table will lead one immediately to the place at which the discourse thereon is to be found.

We recommend the book with great pleasure. Mr. Holmested's name is already favourably known as the editor of the second edition of Leggo's Chancery Forms, and as the author of annotated editions of the Mechanics' Lien Act, and the late Chancery Orders; and we prophesy a ready sale for this latest venture.

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CORRESPONDENCE.

Supreme Court of Canada.

To the Editor of the Canadian Law Times:

SIR,—Your readers are aware that the judgments of this Court established rules of law binding on all the Courts of the Dominion, and are doubtless aware that Parliament, desirous that all Her Majesty's subjects in the Dominion should, at the earliest possible moment, become aware of the law and the reasons for its adjudication, passed a large grant for the publication of the reports of these decisions; yet, for months and months after a decision of this Court, every one is left in ignorance of the reasons on which it may be based, and the judgments of several Courts of inferior jurisdiction reversed.

Of the judgments reported in the last number of those reports, one was argued 4th February, 1879, judgment delivered 13th March, 1880; two were argued 12th November, 1879, judgment delivered 13th December, 1879; three were argued 13th November, 1879, judgment delivered 13th April, 1880; four were argued 13th November, 1879, judgment delivered 29th October, 1880; five were argued 16th June, 1879, judgment delivered 13th December, 1879; six were argued the 8th November, 1879, judgment delivered 13th March, 1880.

This present writing is up to the middle of September, 1881. All the cases were argued in 1879, some judgments delivered in that year, and some later than April, 1880 (some much sooner); so that, for a period of eighteen months, or thereabouts, we know nothing of the decisions of this Court. Ought such a state of things to exist?

The Privy Council within a week publishes its decisions. Is there any reason why the judgments of the Supreme Court should not be published within a month of their delivery. If not one, in two, three, four, five, or six, months; but why eighteen months? Kindly ventilate this through your columns.

Hamilton, 14th Sept., 1881. W. F. B.
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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[OSLER, J., 14TH OCTOBER, 1881.

REGINA v. WASHINGTON.

Conviction—Appeal to Sessions—Right to a Jury—32 & 33 Vict. cap. 31 —36 Vict. cap. 58, sec. 2—New Evidence—Irregularity.

On an appeal to the Sessions from a conviction by a magistrate for breach of a Municipal By-law, it is in the discretion of the Chairman to grant or refuse a request for a jury under 36 Vict. cap. 58, sec. 2, which is declaratory of the meaning of sec. 66 of the 32 & 33 Vict. cap. 31, and does not alone refer to the Act, of which it is a part, which is entitled, "An Act to amend the Acts for more effectually preventing the desertion of seamen; and for other purposes."

Remarks as to embracing in one Act several subjects which are not expressed in the title.

On the appeal, the appellant tendered evidence and witnesses not heard at the trial before the magistrate which the Chairman rejected, relying on 32 & 33 Vict. cap. 31, sec. 66, which, however, has been repealed by 42 Vict. cap. 44. The conviction was amended and affirmed as and for a breach of a Municipal By-law.

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Held, that the appellant had the right, under either the Dominion Act or R. S. O. cap. 74, sec. 4 which governed the case, to have such witnesses examined, and having been deprived of this right, the order of sessions should be quashed.

The original conviction was for "acting in a disorderly manner by fighting and breaking the peace, contrary to the by-law and statute in that behalf;" imprisonment with hard labour was imposed in default of payment of the fine; and the costs were made payable in the alternative to the magistrate or the prosecutor.

Held, bad.

Bethune, *Q.C.*, for the conviction.

Murphy, (with him, *Fullerton*) contra.

[OCTOBER, 1881.

McEWAN v. McLEOD.

Consent Reference—Award—Appeal—Contract—Repudiation—Delay—Measure of damages.

An appeal lies from an award made in pursuance of a consent order of reference, under section 205 of the C. L. P. Act.

On the 3rd October the plaintiff chartered the defendant's vessel to carry salt for 75c. a ton, the effect of the contract being that the vessel was to load and carry within a reasonable time. On the 11th October defendant telegraphed, "Erie Belle cannot go, will you take barge as substitute; answer quick." Some subsequent correspondence took place, the plaintiff holding the defendant to his contract, and the defendant agreeing to perform it. At this time the plaintiff could have got a vessel at $1.00, but waited for the defendant's vessel, which loaded on 25th November; but the master fearing bad weather refused to sail, and it was impossible then to charter another vessel. The plaintiff then sold the salt, sent part by rail, and paid his consignee the difference in price between salt which he had had to buy and the contract price. The freight by rail was $3.50 per ton, and $50c. had to be paid for cartage, which would have been unnecessary had the salt gone by defendant's vessel.

Held, on appeal from the arbitrator, that the defendant was not entitled to hold the plaintiff to the damages which he might have recovered had he chartered a vessel at $1.00 after the telegram of the 11th October; but that the plaintiff was entitled to recover the difference in price paid to his consignee the difference in the freight, and the amount paid for cartage.

Bethune, *Q.C.*, and *Garrow*, for the appeal.

W. Redford Mulock, contra.

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[25TH OCTOBER.

ROBERTS v. CLIMIE.
MURPHY v. CLIMIE.

Demurrer — Libel — Privilege — License Commissioners' resolution — Ultra Vires.

Claim: That the defendant, an Inspector of Licenses, falsely and maliciously published of the plaintiff a circular, which he caused to be sent to all the Licensed Victuallers, etc., in the riding, containing the following words:—"W. R. (and others) are in the habit of drinking intoxicating liquors to excess, and you are hereby notified that you are not to sell, give, etc., intoxicating liquors to the said parties, or to the wife, husband, child, employee, agent, or any member of the family or household of the said parties." Defence: That the Commissioners, in good faith, intending to act within the scope of their powers, passed a resolution, "That no intoxicating liquor shall, under any pretence, be sold, etc., in any tavern, etc., to any person who has the habit of drinking intoxicating liquor to excess, or the wife, etc., of said person, or any person concerning whom notice has been given to the landlord by the husband, etc., of such person, or any Justice of the Peace, or Inspector, that such person is in the habit of drinking, etc. That the licenses were issued to the persons to whom the notices were addressed, subject to the right of suspending them for breach of the resolution. And the defendant was justified, upon information obtained respecting the plaintiff, upon which he followed the terms of the resolution. Demurrer: The resolution was *ultra vires* of the Commissioners.

Held, that the License Commissioners had no power to pass the resolution, which was, therefore, void.

C. *Robertson*, Q.C., for the demurrer.
T. Ridout, contra.

[28TH OCTOBER.

McKITTRICK v. HALEY.

Insolvent Act of 1875—Composition deed—Validity of—Demurrer.

Action of debt by the plaintiff, claiming under a deed of composition and discharge, as assignee of the assignee in Insolvency of a co-partnership, whereby the debt in question was transferred to him. Plea, setting out the deed, whereby the plaintiff covenanted with all the creditors, collectively and severally, to pay them and each of them 50 cents on the dollar of their respective claims against the said Insolvent firm, and on confirmation to pay the costs respecting the Insolvent firm's estate, * * and the preferential claims against the said firm; and averring that at the time of the assignment of the debt to the plaintiff there were and still are separate debts of the Insolvent, or one of them unpaid and unsatisfied, which were not provided for by the deed. Demurrer thereto.

Held, that the deed was defective in providing for the payment of firm

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creditors only, and not including separate creditors, and therefore that the plaintiff's title to the debt failed.

CHANCERY DIVISION.

[FERGUSON, J., OCTOBER, 1881.

GRIFFITH v. GRIFFITH.

Will, Construction of—Vested Interest.

A will contained the following clauses:—"My desire is to have retained for my children my property on Yonge street, and for this purpose I desire that the proceeds of my life insurance be applied in the purchase, for my daughters' benefit, of the incumbrances of that property. Under any circumstances I desire that all my other lands be sold. * * I desire that the proceeds of my estate, and rents of my Yonge street property, be applied * * in the support, maintenance, and education of my two daughters, and in paying the incumbrances on the Yonge street property. After paying the necessary charges, my wish is that the interest of my estate be applied by my Trustees in the support of my children. Should one of my said two daughters die or become a Roman Catholic, her share to go to the other, and should both die without issue, or become Roman Catholics, then my estate to go to my sister L. and her heirs. * * I direct that my Trustees shall divide the proceeds of my estate equally between my two daughters, allowing each during their minority, or until the marriage of one or other of them, a sum sufficient to maintain and educate them, and after they come of age, an equal share of all proceeds to be secured and paid them, free from all control of any husband or any ether person." The testator had only two children, his said two daughters. Both attained the age of twenty-one without having become Roman Catholics.

Held, that the interests taken by the daughters were vested, but subject to be divested upon the happening of the events mentioned before twenty-one; and that at this age the shares vested absolutely in them; and L., therefore, took nothing under the will at present.

W. Cassels, for the plaiutiff.

W. Roaf, and *Ewart*, for defendants, respectively.

TRAVIS v. BELL.

Conveyance impeached for Fraud—Dismissal of Bill—Costs.

A bill to set aside a conveyance, as having been obtained for a nominal consideration from the grantor, who was alleged to be bodily and mentally infirm. It appeared in evidence that the only inequality between the

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grantor and grantee was, that the former was an old man and the latter not so old. The grantee had given about the full market value of the land, and to secure part of the purchase money had executed a mortgage thereon. Upon dismissal of the bill, with costs, it was alleged that the plaintiff was worthless, and, on application of defendant's counsel, his costs were allowed to be deducted from the mortgage money, if they were not paid within a month.

Ewart, for the plaintiff.

S. H. Blake, Q.C., and *McClive*, for respective defendants.

In re WELLAND CANAL ENLARGEMENT.

FITCH v. McRAE.

Valuation — Compensation to Owner — Landlord and Tenant — 37 Vict. cap. 13.

The Government of Canada, having taken the land of the defendant's testator for the purpose of the canal, paid into Court, under 37 Vict. cap. 13, a sum fixed by the valuers, which was intended to cover all claims which the owner might have of whatever nature; and the owner was to remove buildings, etc., and, on payment of the money, to convey, free from dower and all incumbrance, including taxes. The plaintiff was lessee of the premises taken, and claimed compensation for disturbance.

Held, that the plaintiff was entitled to his compensation out of the moneys paid into Court by the Government as compensation to the defendant's testator; and that his claim was one that the owner was liable for under 37 Vict. cap. 13, sec. 1. and should have taken into consideration, and upon the evidence did take into consideration, in settling the amount to be paid.

Rykert, Q.C., for the plaintiff.

Cox, for the defendant.

P. McCarthy, for the Crown.

[PROUDFOOT, J., OCTOBER, 1881.

KILLINS v. KILLINS.

Administration—Imperfect Accounts—Costs.

The fact that an administratrix kept imperfect accounts, which were made up partly from scattered entries and partly from memory, was held to be sufficient justification for the institution of the suit, although no loss had occurred.

Held, that she should therefore pay the plaintiff's costs up to the hearing.

The administratrix had also invested the money of the estate on land out of the jurisdiction of the Court, and on personal security, but no loss had occurred, as all the loans had been repaid.

Held, that she was entitled to her costs subsequent to decree out of the estate.

W. Cassels, for plaintiff.

Moss, Q.C., for defendant.

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BANK OF MONTREAL v. HAFFNER.

Mechanic's Lien—Mortgagee—Owner—Demurrer.

Bill by the plaintiffs as assignees of a mechanic's lien to enforce the same. The lien was registered, and a suit duly prosecuted. The bill claimed priority for the lien over the claim of a mortgagee whose mortgage was dated prior to the contract, to the amount by which the selling value of the land had been increased by the work and materials. The mortgagee's representatives demurred, on the ground that the mortgagee was an owner of the land within the meaning of the Mechanics' Lien Act, and that proceedings had not been taken against him within the specified time.

Held, that he was not an owner within the meaning of the Act, not being a person at whose request or upon whose credit, etc., the work was done.

W. Cassels, for the demurrer.

Maclennan, Q.C., contra.

STEWART v. GESNER.

Special case—Will—Construction of—Mortmain.

A bill contained the following clause.—"I will that the residue being above the sum of $2,800, shall be paid to the four Churches of England in the townships of Oxford and Howard in four equal parts, to the Howard Church, Morpeth Church, Highgate Church, and the proposed new church at Clearville, and to be applied by my executor in payment of any debt upon each of such churches, and in case of no debt or a residue after payment of such debt on each church, then the residue is to be paid to the Churchwardens, to be held by them in trust, and to be invested by such Churchwardens, and the interest arising therefrom to be paid to the incumbent of said church, as a portion of his salary." There was a large debt on Morpeth Church for money borrowed on mortgage to pay the building debts. The Church at Clearville was not built at the time of the testator's death, but debts had been incurred for materials and work on the foundation.

A special case was stated for the opinion of the Court.

Held, (i) that the mortgage debt on the Morpeth Church could not be considered as a building debt; but if it could be so considered the bequest to pay the same would be void under the Statutes of Mortmain. (ii) That as to the Clearville Church, which was in course of erection, the building debts would form a lien on the lands from the beginning of the work under the Mechanics Lien Act, and the bequest to redeem these debts would, therefore, be void, unless the work was being performed so as not to create a lien on the land. (iii) That the bequest for the benefit of the incumbent would have been void, if the investment had been directed to be made upon realty, but as the trust might be carried out by investing on personalty, the bequest would be valid if so invested. (iii) That the amount to which the incumbent would be entitled, was the residue after deducing the void bequests for debts.

W. Cassels, for plaintiff.

Atkinson, for executors.

J. Hoskin, Q.C., for the Charities.

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HARDING v. CARDIFF.

Eminent Domain—Municipal Act—Award—Costs.

There is a distinction between the rights conferred upon municipal corporations and railway companies respectively to expropriate private property—the former existing for the public good, the latter being commercial enterprises. The charters of the latter are, therefore, more rigidly construed than the rights of a municipal corporation.

Upon a construction of ss. 373 and 456 of the Municipal Act, a municipal corporation has power to enter upon and take land for the purposes permitted by the Act before making compensation to the owner, who is not entitled to insist upon payment as a condition precedent to the entry of the corporation.

When a municipal corporation had so entered, and a bill to set aside an award for improper conduct, and inadequacy of compensation failed upon these grounds,

Held, that as the corporation had properly exercised their statutory rights, the plaintiff should pay all costs.

Moss, Q.C., for the plaintiff.

S. H. Blake, Q.C., for the defendants.

IN CHAMBERS.

[THE CHANCELLOR, 26th OCTOBER.

CRUSO v. BOND.

Mortgage—Acceleration Clause—Foreclosure.

The plaintiff's mortgage, made in pursuance of the Statute respecting Short Forms of Mortgage, contained the usual clause, providing that, in case of default in payment of interest, the principal should immediately become due and payable. Default was made in payment of interest, and a bill was filed on the 29th June, 1881, alleging the default, and claiming that the principal money had in consequence become due. The prayer was for immediate payment and possession, and foreclosure. The defendant tendered the principal, interest, and costs, which the plaintiff refused to accept, claiming that the bill was filed to enforce payment of the overdue instalment of interest only, and that the defendant was, therefore, only entitled to pay off the arrears of interest and costs. The Master in Chambers, on the 10th October, held that the practice had been changed since the decision of Esten, V.C., hereafter referred to, and that the plaintiff, by claiming immediate payment of the principal under the acceleration clause, had elected to call in the whole debt, and that he was bound in this suit by his election, and the defendant was, therefore, entitled, upon paying the amount claimed, to a reconveyance of the land.

Held, on appeal from this ruling, reversing the same, that the plaintiff was bound to accept the arrears of interest and costs only.

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His Lordship, in giving judgment, said:—"The very question has been determined by Esten, V.C., in *Drummond* v. *Guickard*, in February, 1864, as mentioned in *Green* v. *Adams*, 2 Ch. Cham. 134. * * It does not become the Master or other Judge, sitting in Chambers, to over-rule this decision, made so many years ago, and acted on in many cases since. I do not see that sufficient distinctions exist between the two cases to warrant a different holding in this case.

Eddis, for the appeal.

G.H. Watson, contra.

BELL v. LAUDER.

Security for Costs—Further Security.

The usual præcipe order for security for costs had been taken out by the defendant and duly complied with by the plaintiff. Replication was filed on 30th June last, and the cause partially heard in September. The hearing was adjourned until December.

The defendant, seeing that the costs far exceeded the $400 security given, applied for further security, which the Official Referee refused.

Held, that, upon all the circumstances of the case, it would not be just to interfere at this stage, by requiring further security.

Plumb, for the appeal.

H. Cassels, contra.

[PROUDFOOT, J., 3RD OCTOBER, 1881.

In re CAMERON.

Money in Court—Payment out—Rule 424.

An order was made, some years ago, by the Referee in Chancery Chambers for the payment out of Court to certain infants, as they came of age, of their shares, which had been duly ascertained.

One infant, having lately come of age, application was made to the clerk in the accountant's office for a cheque under the Referee's order, but he refused to issue it without a Judge's order, under Rule 424 of the O. J. Act.

Held, that under Rule 494, and section 11, sub-section 2 of the Act, the order already made by the Referee was sufficient.

G. M. Evans, for the applicant.

McLAREN v. CALDWELL.

Appeal—Security for costs of—Money paid into Court—Payment out.

Money was paid into Court by the defendant as security for the costs of certain appeals in the suit, and as security for the costs of an appeal from the decree, and all the appeals were allowed.

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Held, that he was thereupon entitled to have the moneys so paid in, paid out to him, notwithstanding a pending appeal to the Supreme Court.

See *King* v. *Duncan*, ante, p. 562.

W. Barwick, for the defendant.

Creelman, contra.

[10TH OCTOBER, 1881.

DAYER v. ROBERTSON.

Appeal from Chambers—Time—Rule 427 (c).

Judgment was delivered, on a motion for security for costs, on the 29th September. The order was issued on the 1st October. The plaintiff appealed, and the appeal came on for argument on the 10th October.

Held, that, as the motion had not been made within eight days after the decision appealed from had been made, the appeal should not be heard. Motion dismissed, without costs, and without prejudice to the appellant's right to move under Rule 462 to enlarge the time for hearing the motion.

The learned Judge, without intending to lay down a general rule, allowed a subsequent application to extend the time for appealing, as the lapse of time had occurred through a mistaken view of the practice.

McPhillips, for the appeal.

G. H. Watson, contra.

SMITH v. BABCOCK.

Examination of Party out of Jurisdiction.

The bill was filed at Lindsay. The plaintiff resided at Port Hope, and his solicitor at Toronto. The defendant resided at Montreal, and his solicitor at Belleville.

The Official Referee appointed Cornwall as the place at which the defendant should attend and be examined, that being the nearest place within the jurisdiction to the defendant's residence.

On appeal from the Official Referee, it was

Held, that this case was distinguishable from that of a party within the jurisdiction who was to undergo examination. The defendant was here to be brought within the jurisdiction, and it was most expedient that his examination should take place at Toronto.

W. Cassels, for the appeal.

W. W. Fitzgerald, contra.

[12TH OCTOBER, 1881.

FOSTER v. MORDEN.

Certificate of Master—Confirmation of—G. O. 642.

The Master at Belleville certified that he had disallowed the accounts of the defendant filed under his order, as not complying with his order to bring them in, and as not being sufficient in substance and form.

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The Referee in Chambers, before vacation, set aside an order for attachment for non-production of the accounts, because the Master's certificate, on which the attaching order was based, had not been confirmed.

Held, on appeal from the Referee, affirming his decision, that the certificate was within the language of G. O. 642, and could not be acted upon until confirmed; but that if this had been merely a certificate that no accounts at all had been filed, it would not have required confirmation.

Arnoldi, for the appeal.

A. Hoskin, Q.C., contra.

[18TH OCTOBER, 1881.

BARKER v. FURZE.

Notice of trial—Chancery Division—Special Sittings—Entry of Action —Rule 266.

A special sitting was appointed to be held at Walkerton for the trial of actions in the Chancery Division. The Official Referee set aside a thirteen days' notice of trial, on the ground that Rule 266 required fourteen clear days' notice to be given, according to the Chancery practice.

Held, on appeal, reversing his decision, that Rule 226, as appears from reading it with the preceding rules, refers only to the officer with whom the entry of action for such trial should be made, and that it left the time for entry, and the length of the notice of trial, to be determined by the preceding rules; and that ten days' notice of trial was, therefore, sufficient.

W. Seton Gordon, for the appeal.

Langton, contra.

[26TH OCTOBER, 1881.

HARVEY v. G. T. RAILWAY CO. AND THE G. W. RAILWAY CO.

Parties—Joinder of Defendants in case of doubt—Rule 94.

Injury had been done to goods carried by the defendant companies over their several railroads, and the plaintiff could not ascertain which line his goods were upon when the injury was done, and each company alleged that the injury had occurred while the goods were under the control of the other.

Held, on appeal from the Master in Chambers, affirming his decision that the case came within Rule 94, and that the plaintiff was entitled to join both companies as defendants.

McMichael, Q.C., for the appellants, the G. W. R. Co.

W Cassells, for the G. T. R. Co.

Muir, for the plaintiff.

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[OSLER, J., 29TH SEPTEMBER, 1881.

KINLOCH v. MARTIN.

O. J. Act, Rule 324—Speedy Judgment--Terms of obtaining—Ratable division of assets.

Before the time for appearance had elapsed, the plaintiff applied, under Rule 324, for leave to enter judgment for his debt, the defendant having acted fraudulently in disposing of some of his property, and in otherwise endeavouring to embarrass his creditors.

Held, that it was a proper case as against the defendant for the exercise of the discretion of the Court, and the order was made for judgment and execution.

Upon the motion, which was argued on the last day for appearance, the defendant's Counsel urged that if an appearance was entered the plaintiff could move in the usual way, if there was no real defence. It appeared by affidavits filed that there were other *bona fide* creditors suing, who, in the ordinary course of procedure, would not obtain their executions until after the plaintiff in this action, though they had commenced proceedings before him.

Held, that Rule 324 was not intended to give a creditor moving thereunder an advantage over other creditors, but was intended to relieve against the conduct of the defendant only; and, as the effect of granting this application absolutely would be to give the plaintiff an undue advantage over other creditors now suing, the order was made upon terms that the plaintiff should share *pari passu* with other judgment creditors who should place their executions in the hands of the Sheriff within eighteen days from the day of service of the plaintiff's writ, in case of an insufficiency of assets.

Ogden, for the motion.

Aylesworth, contra.

[1ST OCTOBER, 1881.

In re ONTARIO BANK v. HARSTON.

Division Court Act, 1880—Prohibition—Territorial Division—Unorganized Tract.

The Division Courts Act, 1880, does not apply to the Division Courts in Territorial Divisions and Unorganized Tracts; and a prohibition was granted to restrain a Stipendiary Magistrate from adjudicating upon a claim on a promissory note for $110.

Delamere, for the motion.

Holman, contra.

[THE MASTER, 30TH SEPTEMBER, 1881.

HEAD v. BOWMAN.

Rule 91—Joinder of Parties—Alternate Relief.

Plaintiff sued defendant for flooding his land by means of a mill dam after the determination of a license to do so. The Great Western Railway

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Company had turned the waters of the stream into another channel, which was not deep enough to carry off all the water, even if the defendant's dam were removed, so that by the act of the Railway Company the plaintiff could not obtain complete relief, if successful against the present defendant.

Held, that the plaintiff should have liberty under rule 91 to add the Railway Company as defendants.

J. G. Robinson, for the motion.
Aylesworth, contra.

LAWLESS v. RADFORD.

Replevin—Seizure — Failure to take bond — Commencement of action— Security for costs.

Replevin. The C. C. Judge had ordered that the Sheriff should hold the goods subject to the order of the plaintiff. The Sheriff had not taken the bond required by section 11 of the Replevin Act. The defendant moved, under section 9 of the Act, to vary the order of the C. C. Judge by directing possession to be given to him.

Held, that the seizure was irregular and should be set aside, as the Sheriff had no right to contravene the express direction of the statute by seizing without taking the bond thereby prescribed, and the C. C. Judge had no power to waive this by his order. The question of costs was reserved till the Sheriff should be notified and heard.

The affidavit upon which the writ was granted disclosed that the plaintiff resided out of the jurisdiction; but the writ, which issued after the twenty-second of August, did not show this. The defendant applied on the same motion for security for costs.

Held, that the writ, and not the affidavit filed to obtain same, is the proceeding by which the action is instituted; and, as it did not disclose the residence of the plaintiff, the defendant was justified in making a motion for security for costs, the order for which was granted in the usual form.

Symons, for the motion.
A. Cassels, contra.

In Chancery.

[SPRAGGE, C.J.O.,* 17TH OCTOBER, 1881.

ARTLEY v. CURRY.

Boundary—Original Monument.

In cases of disputed boundaries, it is well established that it is the work on the ground that governs, and it is only when the site of a monument

* These judgments were delivered in cases heard before his Lordship when Chancellor.

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on the ground is incapable of ascertainment that a surveyor is authorized to apportion quantities between known boundaries.

Where there was evidence of the position of a post which had been planted by a surveyor,

Held, that this must govern, though there was a subsequent survey disagreeing therewith.

McARTHUR v. GILLIES.

Riparian Owners—Description—Boundaries—Obstructions.

Unless qualified by the context, a description of land on an unnavigable stream, in which one course is "to the water's edge," carries the grant to the thread of the stream; and a course continuing the description along the water's edge will extend along the thread of the stream.

A riparian proprietor is not entitled to construct works in the bed of a stream owned by himself, which may cause injury to another riparian proprietor.

Common Law Chambers.

SCOTT v. MITCHELL.

[ARMOUR, J.

Absconding debtor—Entitling of Affidavits.

Affidavits upon which an order was granted for a writ of attachment, were not entitled in any Court, though sworn before a Commissioner who appended to his signature the words, "A com'r in B. R. etc."

Held, following *Ellerby* v. *Walton*, 2 P. R. 147, that the affidavits were sufficient.

Where the plaintiff has reasonable ground for an inference of the defendant's intent to abscond, he is justified in suing out a writ of attachment under the Absconding Debtor's Act.

Aylesworth, for the plaintiff.
McPhillips, contra.

NOVA SCOTIA.

In the Supreme Court.

[Before the Court in Banc.]

MURPHY v. ROMO.

Judgment of County Court reversed on the weight of evidence under County Court Consolidation Act of 1880.

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MOTTON *et al.* v. BRENNAN.

Plaintiffs' action was brought in the County Court to recover professional fees as solicitors, attorneys and barristers. The principal question of fact was as to the services covered by a sum of $100 paid by defendant to plaintiffs, upon which the evidence was conflicting. The judgment below was for plaintiffs; and defendant having appealed, applied, after the cause had been one term on the docket, and had become a remanet, to amend the grounds of appeal under section 104 of the County Court Act of 1880, by adding the ground that barristers had no right to recover for professional services. The Court refused the amendment, and held, on the merits, that the evidence was not strong enough to justify them in disturbing the judgment.

DENNISON v. JACK.

Appeal from the County Court dismissed, where the rule for appeal was in these terms: "I do order that the judgment be set aside on the following grounds * * * unless cause to the contrary is shown before the Supreme Court at Halifax within the first four days of the ensuing December Term."

Certiorari quashed, where the order was granted by a Judge, and the writ issued by a commissioner, who was directed in the order to endorse upon the writ the amount for which bail was filed, etc,—the Court holding that the Judge had no power to order a commissioner to endorse the writ.

McDONALD v. McDOUGALL.

Appellant moved last term to transmit the papers to the County Court at Port Hood to be certified, which was refused. The motion was served this term under the statute of 1880, passed since last term. The Court refused a rule. Appellant then moved to dismiss his appeal, and a rule was granted dismissing the appeal, with costs to the time the motion was made.

CHIPMAN v. GAVAZA.

No one appearing for appellant (defendant), plaintiff's counsel was directed to argue the case on behalf of respondent.

In re BATH ESTATE.

The Judge of Probate refused to grant an appeal from his decision, on the ground that the bond, although in the form given in the statute, did not state what cause was pending. The appeal was then granted by a Judge of the Supreme Court at Chambers.

Held, that the bond was in the proper form.

HARRINGTON v. NITTER.

Plaintiff brought an action, February 20, 1876, on two promissory notes, with a count for fraud under section 136 of the Insolvent Act of 1875.

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Defendant had become insolvent in December, 1875, and obtained from his creditors a deed of composition and discharge, which was duly confirmed, September 16th, 1876, previously to which date plaintiff had accepted a composition on the notes sued on, but plaintiff did not sign the deed. Defendant having pleaded, March 8th, 1876, added a plea, September, 1878, setting up the deed and the acceptance of a composition, but did not plead the discharge *puis darrein continuance*, his counsel apprehending that the effect of such a plea would be to confess the fraud charged in the declaration. The cause was tried in April, 1880, when a verdict was found for the plaintiff for the balance of the notes sued on, but the jury acquitted the defendant of the charge of fraud. Defendant then took a rule *nisi* to stay proceedings, on the ground that the debt had been discharged.

Rule *nisi* discharged with costs.

Per RITCHIE, C.J. The defendant could have pleaded the discharge *puis darrein continuance*, with a simple protest that there was no fraud.

HUTT v. SUTHERLAND.

Plaintiff sued on a note made by defendant to John T. Fraser for $70.86, and endorsed to him. Defendant pleaded a discharge in insolvency, to which plaintiff replied that the debt had not been scheduled in compliance with the Act. The schedule contained the following: "John T. Fraser's note, $72.60."

Held, that the schedule did not sufficiently describe the note, which, being negotiable, should have been scheduled as "negotiable paper, the holder of which is unknown."

[Before the Full Court.]

MATHESON v. McLEAN.

The Court declined to entertain an appeal from the County Court in a cause originating in the Magistrate's Court, where the rule for appeal was taken upon filing security, and not "granted" by the Judge within the meaning of sec. 8 of cap. 20, 1879.

In re MORTON (COLLIE'S CLAIM).

Objections to claim against insolvent estate dismissed, where no evidence was filed with the assignee of service of copy on the claimant; *Insolvent Act of* 1875, *sec.* 95.

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THE

CANADIAN LAW TIMES.

VOL. I. DECEMBER, 1881. No. 17.

ON THE LEGAL DEGREES OF MARRIAGE IN CANADA.

IV.

IN conclusion, we shall do no more than refer to the law affecting the other Provinces, inasmuch as the same questions do not arise there as in Ontario. Before Confederation, all the Provinces, except Upper Canada, had laws respecting marriage and divorce, and Courts for their enforcement.

In Quebec, the prohibition against marrying within certain degrees is a statutory one. In the direct line marriage is prohibited between ascendants and descendants, and between persons connected by alliance, whether they are legitimate or natural (*a*). In the collateral line, marriage is prohibited between brothers and sisters, legitimate or natural, and between those connected in the same degree by alliance, whether they are legitimate or natural. Marriage is also prohibited between uncle and niece, aunt and nephew (*b*). The other impediments recognized according to the different religious persuasions, or resulting from relationship or affinity, or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities. The right, likewise, of granting

(*a*) *Code Civil*, 124.
(*b*) *Ibid.* 125, 126.

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dispensations from such impediments appertains, as heretofore, to those who have hitherto enjoyed it (*c*). The duty of a Civil Court under this law is to declare that parties within the degrees mentioned, who go through the ceremony of marriage, are not man and wife. The law as to Roman Catholics stands upon a different basis. Marriage being a Sacrament of the Church of Rome, they claim that the Civil Courts should not adjudicate upon the matter, and their claim is allowed. The Civil Courts refer the question for trial to the Bishop of the Diocese, who certifies the result of his investigation (*d*).

In New Brunswick, the law (as far as we can ascertain it with limited facilities for enquiry, and no reported cases) is practically the law of England before the 5 & 6 Wm. IV. cap. 54; and reference must be had to the Statutes of Henry VIII., to which we referred in our first paper, in order to ascertain this. The 5 & 6 Wm. IV. cap. 54 plainly does not extend to the colonies, and therefore marriages within the degrees which are prohibited by the law of England, and which would be void under the 5 & 6 Wm. IV. cap. 54, are voidable in this Province. A case of *Pugh* v. *Pugh* was lately decided there, in which a marriage between a man and his first wife's sister was annulled on account of affinity (*e*).

In Nova Scotia, there is also a statutory adoption of the law of England as it existed prior to the 5 & 6 Wm. IV. cap. 54. By the R. S. 3rd series, cap. 126, sec. 4, it is enacted that "The Court of [Marriage and Divorce] shall have jurisdiction over all matters relating to prohibited marriages and divorce, and may declare any marriage null and void for impotence, adultery, cruelty, or kindred within the degrees prohibited in an Act made in the 32nd year of King Hen. VIII., entitled 'An Act for marriages to stand, notwithstanding pre-contracts,' and no other causes whatsoever."

(*c*) *Ibid.* 127.

(*d*) *Lussier* v. *Archambault*, 11 L. C. J. 53; *Vaillancourt* v. *Lafontaine*. 11 L. C. J. 305; *Laramie* v. *Evans*, 24 L. C. J. 235.

(*e*) We are informed by the learned reporter of the Supreme Court that the matrimonial cases are not reported.

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Prince Edward Island, as well as the other Maritime Provinces, has its Court of Marriage and Divorce; and the causes for divorce are those enumerated in the 32 Hen. VIII.

In British Columbia, the Supreme Court has jurisdiction in divorce and matrimonial causes; and the law thereof, as it existed at the time of the union with Canada, is to be found in the Revised Statutes, 1871, No. 89, sec. 19, whereby it is "Provided that, in all matters relating to * * the qualification of parties about to marry * * the law of England shall prevail, subject always to the provisions of this ordinance." The law of England, at the time of the passing of this ordinance (1867), was laid down in the 5 & 6 Wm. IV. cap. 54, so that marriages within the prohibited degrees are absolutely null and void.

In Manitoba, the Court of Queen's Bench may and shall decide and determine all matters of controversy relative to property and civil rights, both legal and equitable, according to the laws existing, or established and being in England, as such were, existed and stood on the 15th July, 1870, so far as the same can be made applicable to matters relating to property and civil rights in the Province of Manitoba (*f*).

Though, before the 5 & 6 Wm. IV. cap. 54, the disabilities annexed to a man in respect of the essentials of marriage were ecclesiastical, and not civil, disabilities, yet that Statute now imposes a disability upon a man, which is a restriction upon his former civil right to marry any one he pleased, without regard to consanguinity or affinity. The provisions of that Statute are carried out by the civil courts in England, and it may, therefore, fairly be said to be in force in Manitoba under the Provincial Statute referred to.

The fact that in several of the Provinces there are no reports, is a great obstacle to an examination of the law, and we make the references to the Statute law with great diffidence on that account. Since Confederation, no Pro-

(*f*) Con. Stat. Man. cap. 31, sec. 4.

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vince has the power to deal with the law affecting the essentials of marriage. Hence the laws existing at the time of Confederation remain until altered by the Parliament of Canada.

It will be seen from the very imperfect review which we have been able to make of this important branch of the law, that any legislation must tend towards assimilating the laws of the several Provinces, and making the law of marriage and divorce the law of Canada. More than ten years ago, an able writer in the *Canada Law Journal* pointed out the necessity of immediate legislation upon the laws of marriage. His essays were, however, confined to the ceremonial or civil law of marriage. No less urgent is the need for a uniform law upon that branch which we have been discussing. It was said in *Roth* v. *Ehman*, Chic. Leg. News, 9th July, 1881, at p. 354, that a man, by becoming a citizen of the United States, acquired thereby no qualifications in respect to the essentials of marriage. He is affected by the law of the State in which he is domiciled. So it is in Canada. The laws of the Maritime Provinces differ from that of all the other Provinces. The laws of British Columbia and Manitoba are like those of no other Province; and Ontario has no law. A uniform enactment would prevent a conflict of laws between the Provinces, and the consequent arising of those harassing and vexing questions which private international law has to deal with.

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ASSIGNMENTS FOR CREDITORS' BENEFIT.

"An Act respecting the fraudulent preference of creditors by persons in insolvent circumstances," R. S. O. cap. 118, (22 Vict. cap. 96), section 2, enacts that assignments made by insolvent debtors of goods, chattels or effects, or of bills, bonds, notes or other securities, or property, with intent to defeat or delay creditors, or with intent to give some creditors a preference over others, shall be void as against creditors; but this provision shall not "invalidate or make void any deed of assignment made and executed by any debtor for the purpose of paying and satisfying rateably and proportionably, and without preference or priority, all the creditors of such person their just debts."

This provision, which, while the late bankruptcy laws were in force, remained practically a dead letter, has been galvanized into fresh life and importance by the repeal of the Insolvent Act of 1875. It is apparently not meant to apply to realty, assignments of which are consequently now governed by the laws in force before either an insolvent Act or this section was on the statute book. Hence, a proper consideration of the subject will involve some examination of the authorities prior to the passing of the Act, as well as the decisions thereunder. The present object, however, being to treat rather of assignments coming within the first saving clause, quoted above, than those prohibited by the main enactment, and declared to be void, it will be found that much of the law to be reviewed applies to real and personal property alike, and it will be necessary to refer specially to the law affecting conveyances of land in trust for creditors only where it appears to differ from that governing assignments of personalty upon similar trusts. A transfer of both classes of property by one deed on the same trusts, if good as to personalty under the statute, will also be good as to the lands therein comprised, and may be unimpeachable as to lands, though void under the statute as to goods.

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The protected assignments are those made by debtors, by *deed*, for the purpose of satisfying rateably and proportionably the claims of creditors. Though a trust, valid and irrevocable as between the parties, of such property as that covered by the statute, may be well created by a writing not under seal, or, perhaps, by parol agreement, it will apparently satisfy this enactment, and be good as against creditors only when created by a "deed of assignment made and executed" by the debtor.

Who are the necessary parties to, and who must execute, such a deed of assignment? The debtor and trustee should be parties, and the debtor in every case must execute. Where the trustee is himself a creditor the creditors need not be parties, and no creditor need sign (*a*). Probably the same rule may be applicable where, as is usually the case, the trustee is a member of a co-partnership, to which the assignor is indebted. Where the trustee is not a creditor, the common opinion, among members of the profession, appears to be that no such assignment can be validly made without the creditors being parties to the deed, nor without, at least, one of them executing. This view is supported by *Garrard* v. *Lord Lauderdale* (*b*), and by the head-note to *Maulson* v. *Topping* (*c*), which has been copied into an excellent Digest without comment or correction. The judgment of the Court in the latter case does not, it is submitted, warrant so broad a proposition. There the deed (which was made before 1859) was open to several objections, which were referred to on the argument. It provided for payment of certain claims in full, in preference to others, precluded all creditors who refused to grant a release from participation, and was executed under circumstances of suspicion to a person as a trustee, who neither was a creditor himself, nor acted with the knowledge or concurrence of any creditor, for the express purpose of defeating the defendant's execution which was placed in the Sheriff's hands a few hours after the assign-

(*a*) *Siggers* v. *Evans*, 5 E. & B. 367.
(*b*) 3 Sim. 1.
(*c*) 17 U. C. R. 183.

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ment was made. The creditors were expressed to be parties to the deed, but up to the time the executions were handed to the Sheriff no creditor had executed.

On the point under consideration, Robinson, C.J., in delivering judgment, says: "We think it clear that in this case the execution was entitled to priority * * * for here it is not pretended that any creditor had executed the deed before the Sheriff came with the execution, and Maulson, the Assignee, was not himself a creditor, *nor had anything taken place that appeared in evidence by which the relation of trustee and cestui que trust can be said to have been created before the Sheriff seized.*" That language, so peculiarly apt to the case then under review, certainly affords no support to the contention that no valid assignment can be made to a stranger without the creditors being parties to and executing the deed. It suggests rather a less superficial rule for determining the validity or otherwise of such a transfer of assets, viz., whether the relation of trustee and *cestui que trust* has been effectually created. This is the test applied by Lord Campbell, C.J., in *Harland* v. *Blinks* (*d*), where the question is stated to be "whether the relation of trustee and *cestui que trust* was established between the plaintiff and any of the creditors. If not, the deed was voluntary and revocable."

Probably, the most instructive judgment in our courts on this branch of the subject, is that of the late Chancellor Blake, in *Goodeve* v. *Manness* (*e*). After a concise review of the authorities, it is there laid down that "a conveyance of property, for the benefit of creditors, may create a valid and irrevocable trust, although none of the creditors are parties or privy to the deed; and, when the conveyance is not in its inception a valid and irrevocable trust, it may become so by subsequent dealings or communications between the debtor or his trustees and the creditors, which may give them an indefeasible interest under the deed." See also *Wilding* v. *Richards* (*f*), *Griffith* v. *Ricketts* (*g*),

(*d*) 15 Q.B. 713.
(*e*) 5 Gr. 114.
(*f*) 1 Coll. 664.
(*g*) 7 Hare, 299.

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and *Smith* v. *Hurst* (*h*). *Garrard* v. *Lord Lauderdale*, being at variance with these cases, and its authority being questioned not only by Chancellor Blake in *Goodeve* v. *Manness*, but by Lord Campbell in *Harland* v. *Blinks*, by Sir Hugh Leach in *Acton* v. *Woodgate* (*i*), by Lord St. Leonards in *Brown* v. *Cavendish* (*j*), and by Vice-Chancellor Wigram in *Kirwan* v. *Daniel* (*k*), can no longer be regarded as good law. It will be observed that all the authorities above quoted are either English cases or decisions of our courts before this Statute was passed. They are, however, binding authorities still, as the question here is whether an assignment which is being questioned is one for the benefit of the creditors, giving them a vested equitable interest, or whether it is a revocable arrangement, made for the debtor's own convenience, on which point the Statute has made no change in the law. What is believed to be deducible from the cases is that the validity of an assignment on this point depends on the intention of the parties, to be gathered from the circumstances, rather than upon creditors being or not being parties to the deed.

In *Burrit* v. *Robertson* (*l*), Burns, J., expressed an opinion that a deed which insisted on execution thereof by creditors, before allowing them to participate, was void under the Statute, no matter what its provisions otherwise were; but such a deed appears to have been upheld against that objection in *Feehan* v. *Lee* (*m*).

Before 22 Vict. cap. 96, a provision in a deed of assignment, that creditors taking under it should release the debtor from all claims beyond the property assigned, was considered to render the deed void as against subsequent executions (*n*). The contrary was, however, decided by the

(*h*) 17 Jur. 30.
(*i*) 2 M. & K. 495.
(*j*) 1 J. & L. 635.
(*k*) 5 Hare 499.
(*l*) 18 U. C. R. 555.
(*m*) 10 C. P. 385.
(*n*) *Wilson* v. *Kerr*, 17 U. C. R. 168; 18 U. C. R. 470; *Maulson* v. *Topping*, 17 U. C. R. 183; *McDonald* v. *Putman*, 7 Gr. 395.

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Court of Common Pleas in *Bank of Toronto* v. *Eccles* (*o*), and this decision was upheld by a majority of the Court of Error and Appeal (*p*), and followed by the Court of Chancery in *Mulholland* v. *Hamilton* (*q*). The error of supposing that *Bank of Toronto* v. *Eccles*, which was decided after the passing of the Statute, but which referred to an assignment executed before that time, is still a binding authority, is not uncommon, and appears to have crept into, at least, one Text Book (*r*). It is quite clear that such a stipulation in a deed executed since the Statute invalidates it as against the creditors, so far as personalty is concerned (*s*). As to land, such a provision would still probably be upheld. But a provision that creditors executing should release unless they added the words "without release" to their signatures, was held by the Court of Common Pleas in *Feehan* v. *Lee*, supra, not to invalidate an assignment.

A provision for the continuance of the business by the trustee, if *bona fide*, will not invalidate an assignment; nor is a stipulation for the employment of the debtor in the winding up of the business necessarily bad. In reference to these points, and to a provision for the purchase of new stock, it is a question of fact to be decided in each case, under all the circumstances, whether the assignment was really made by the debtor, and accepted by the trustee for the benefit of creditors (*t*). A deed, providing for advances being made by the trustees, upon which they were allowed a commission of ten per cent., to be a first charge on the assets, and giving power to employ the debtor, was held void (*u*). Such a provision for the continuance of the business as makes creditors liable as partners avoids a deed (*v*).

(*o*) 10 C. P. 282.
(*p*) 2 E. & A. 53.
(*q*) 10 Gr. 45.
(*r*) See Taylor's Equity Jurisprudence, 855, p. 362.
(*s*) *Burritt* v. *Robertson*, supra; *Darling* v. *McIntyre*, 19 U. C. R. 154; *Cropper* v. *Patterson*, 19 U. C. R. 160.
(*t*) *Taylor* v. *Whittemore*, 10 U. R. 440; *Maulson* v. *Peck*, 18 U. C. R. 113.
(*u*) *Hendry* v. *Harty*, 9 C. P. 520.
(*v*) *Metcalf* v. *Keefer*, 8 Gr. 392.

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An assignment may provide for payment to the trustee of a reasonable remuneration for his trouble in winding up the estate (*w*). What is reasonable will depend on the circumstances. In *Feehan* v. *Lee*, a commission of five per cent. was held unobjectionable, under the facts of that case.

In *Badenach* v. *Slater*, tried at the last York Winter Assizes, an objection to a deed, that it exempted the trustee from liability, except for his own acts and defaults, was overruled by Wilson, C.J. Unless the protection is broader than that afforded by our law to all trustees, it is difficult to understand how it can be objectionable. Where it is broader, there may, possibly, be some question; where no broader, it appears quite unnecessary.

One member of a trading co-partnership cannot, without the express consent of his co-partners, assign the assets of the firm in trust for the benefit of the creditors of the co-partnership (*x*).

An assignment, made on the understanding that the debtor should keep possession of his household furniture, was, in *Wilson* v. *Kerr*, supra, held void on that ground.

Assignments in trust for creditors come within the statutes requiring registration, and should, unless there is an actual change of possession, contain proper descriptions of the goods assigned, and be duly filed in the County Court with a proper affidavit of *bona fides* (*y*). Where such an assignment is filed within the five days allowed by the Statute, it relates back to its date, and is good as against an execution placed in the sheriff's hands within the five days (*z*).

A trustee for creditors, being bound by the acts of his assignor, is not the proper party to file a bill to set aside an alleged preferential assignment of assets made by the

(*w*) *Metcalf* v. *Keefer*, supra.

(*x*) *Cameron* v. *Stevenson*, 12 C. P. 389; *Stevenson* v. *Bain*, 9 C. L. J. 110; Ch. Cham., per Spragge, C.

(*y*) *Kerr* v. *Wilson*, supra; *Heward* v. *Mitchell*, 11 U. C. R. 625.

(*z*) *McInnes* v. *Benedict*, 8 C. L. J.; C. C. per Hughes, Co. J.

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debtor before the execution of the trust deed (*a*). Such a trustee is subject to the jurisdiction of the Court of Chancery, and may be removed for misconduct or delay in winding up the estate (*b*). That Court will also reform such a deed in a proper case where assets have been omitted by fraud or mistake (*c*). A trustee should not distribute the proceeds of the estate without notice to all creditors of whom the debtor has advised him to send in their claims, nor without advertising, as an executor must, for other claims.

In one case, certain creditors who, with the concurrence of the debtor, and after notice of an assignment made by him for the benefit of his creditors *pari passu* recovered judgment and seized goods covered by the assignment, refusing to execute or to have anything to do with it, were, after the validity of the assignment had been established, precluded from sharing with the other creditors under it (*d*). That case was, however, peculiar in its circumstances, and cannot, it is submitted, be relied on as an authority for the proposition that a creditor who contests the validity of an assignment cannot afterwards claim under it. It must also be observed that the case arose before this Act became law, and when valid assignments might be made which provided for some only of the creditors. Under the present law, the trust must be for all creditors alike, or it will be binding only as between the parties, and it is difficult to see how, under the section under review, it could be

(*a*) *McMaster* v. *Clare*, 5 Gr. 550. The authority of this case is not, it is submitted, affected by the decisions of the Court of Appeal in *Re Andrews*, 2 App. R. 24, and *Re Barrett*, 4 App. R. 206, cases arising under the Insolvent Act of 1875. There the question was, the extent to which under the Statute an assignee in insolvency was clothed with creditors' rights; and even on that point it is doubtful whether these decisions may safely be regarded as having finally and authoritatively settled the law—the first being the judgment, or on this point perhaps only the dictum, of one judge, while in the second the Court was not unanimous—the opposite construction having, in the meantime, been placed on the Statute by the Court of Queen's Bench in *Ontario Bank* v. *Wilcox*, 43 U. C. R. 460, which does not appear to have been referred to on the argument or in the judgment of the Court in *Re Barrett*.

(*b*) *Quebec Bank* v. *Snure*, 16 Gr. 681.

(*c*) *Gillespie* v. *Grove*, 3 Gr. 558.

(*d*) *McKay* v. *Farish*, 1 Gr. 333.

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held that a creditor who contests, on any ground, a deed providing for rateable distribution, would have to do so at the risk of being entirely excluded from participation, if unsuccessful.

Under the late insolvent law, any creditor holding security on anything which would, in the hands of the debtor, have been assets available to other creditors, was compelled to value such securities and rank for the balance only. Under the present law it has just been decided by Ferguson, V.C., in *Beaty* v. *Samuel*(*e*), that a creditor holding such security is, nevertheless, entitled to rank for and receive dividends upon the whole amount of his claim in the same manner as other creditors, the only option left to the trustee being to pay off the claim in full and take an assignment of the security for the benefit of the trust. Among the many other questions sure to arise under this Statute are, Has a trustee any right to sell debts due the assignor, or must he collect them? Who are creditors, and what constitutes a just debt within the meaning of the Statute? and many others, upon which it would be unwise here to hazard any opinion.

D. E. THOMSON.

(*e*) 1 C. L. T. Occ. n. 560.

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EDITORIAL REVIEW.

The Judicature Act.

The Judicature Act has been long enough in working to disclose both defects and excellencies. We pointed out several of its defects in detail, in a former number. Among them, we noticed that there was no provision for showing by the writ of summons the land in a mortgage case, and suggested that it might be necessary to deliver a statement of claim with the writ. This practice, as we believe, was very generally followed until lately. It has been held by his Lordship the Chancellor, that it is not necessary to deliver a statement of claim, but that the endorsement should be framed so as to comprise a description of the mortgaged premises. If the latter be too long for endorsement, it may be drawn upon a separate piece of paper and attached to the writ. The cost of a statement of claim in ordinary cases will therefore be hereafter disallowed.

The case of *Harvey* v. *G. T. R. Co. and G. W. R. Co.*, *ante*, p. 659, is the first case in our courts under R. 94. This rule provides that, "where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may * * join two or more defendants." The facts sufficiently appear in our note of the case, and substantial justice has, no doubt, been done. But the arguments advanced by the learned counsel for the G. W. R. Co. are worth noting. Upon the argument he stated the following proposition:— The plaintiff is walking past A. and B. He is struck by a missile which, so far as he can ascertain, came from the direction in which A. and B. are standing. He "is in doubt as to the person from whom he is entitled to redress." He joins A. and B. as defendants in an action. It is sufficient for the defence to adopt the policy of a masterly inactivity, and to move for a non-suit, on the ground that there is no evidence against either. The argument will apply to the case of a whole multitude as well as to that where there are only two defendants. To those familiar

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with equity practice, the argument overlooks that most useful engine of warfare—discovery. If *Harvey's* case be not a case for the application of this rule, it is difficult to conceive a state of facts to which it properly applies.

Kinlock v. *Martin*, ante, p. 660, discloses how an undue advantage might be taken of a rule intended to operate against a defendant only. In the race for judgments the plaintiff endeavoured to gain priority by moving for judgment before appearance. He was plainly entitled to judgment for his debt; but, inasmuch as other *bona fide* creditors, who were suing and awaiting the result of the ordinary procedure, would have been unfairly treated, the order was granted upon terms. Familiarity with the Act shows that a debtor, desiring to give a creditor a preference, will not accelerate his judgment by making default in appearing. The favoured creditor, who signs judgment in default of appearance, has to wait eight days for his execution; while another creditor, who hears of the proceedings, may issue his writ within two or three days after the first writ, and, upon appearance entered, immediately give notice of motion for judgment under rule 80, and get immediate execution, while the favoured creditor is waiting for his eight days to expire. Whether such terms as those imposed in *Kinlock* v. *Martin* could be imposed upon a motion under rule 80 is doubtful. Under the present state of the law as to preferential judgments this is a matter of some importance. A debtor may appear to a writ upon the day of service, and an order for judgment may be made in three days thereafter upon notice of the motion. If the Court should treat such a motion in its true light as an effort to gain a priority over other creditors, *quære*, whether the order would be granted. At present, a *bona fide* judgment creditor may retain his priority obtained by collusion, provided it has not been obtained in any of the three ways mentioned in R. S. O. cap. 118. But, to recognize the validity of a priority obtained by agreement between the parties to expedite the ordinary legitimate process of the Court is one thing, and to actively assist the parties to such an end, to the possible detriment of other creditors, is quite

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another thing. The point is an interesting one, and one that may easily, and probably will shortly, arise. The minds of the practitioners of the present day are tinged with the equity of the insolvency laws, which aimed at a rateable distribution of bankrupt estates, and legitimate means of working out such a result will, no doubt, still always be sought for.

Occasional Notes.

The unusual haste with which Numbers 4 and 5 of 46 U. C. R. have come out, renders our notes of the cases in that number somewhat stale to the readers of the Reports. We trust, however, that our notes may be of interest to others.

NOTES OF RECENT DECISIONS.

Erb v. *Great Western Railway Company*, 5 S. C. R. 179. Almost simultaneously with the report of this case comes a notice in the *Central Law Journal* of an American case exactly parallel, with the exception that the railway company's agent who issued the fraudulent receipt and the pretended shipper were different persons. The above journal refers to the case (*Robinson* v. *Memphis, Etc., Ry. Co.*, before the U. S. Circuit Court for the Western District of Tenessee) as involving a novel and interesting question of commercial law. "Hammond, J., held that the authority of a railroad company's agent, in respect of a bill of lading, commences only with the delivery of goods to him, and extends only to the issuance of a bill for goods actually received, and that it is not within the apparent scope of his authority to sign and issue documents for the purpose of

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having them attached to drafts, or otherwise pledged as collateral security. The Court thus applied to the case of a railroad's bill of lading the well established law governing shipments by vessel, as held in *Grant* v. *Norway*, 10 C. B. 665, and *The Schooner Freeman*, 18 How. 182. The Court declined to treat the carrier in such cases as an insurer outside the contract of carriage, or as engaging in the business of issuing bills of lading to be used as negotiable securities by bankers or merchants for their own convenience. 'Commercial men have, from time immemorial, for their advantage, and not at all for that of the carrier, let it be remembered, treated these documents as convenient symbols, or muniments of title; and, as instruments of transfer of title, they have, for that purpose, acquired among them a *quasi* negotiability, or capacity to pass from hand to hand by indorsement. But the carrier is not at all benefitted by this, and it is not for his gain that it is done.'" From the short quotation given, the element of a Statute making bills of lading evidences of title was apparently absent from the Tennessee case. *Quære*, whether it would have made any difference in that case; for our Statute made law that which Hammond, J., enunciates as a usage between the parties, and for their own benefit. A full report of the American case, which, we presume, will soon appear, will furnish interesting reading to those who have watched the varied course of opinion both in the principal case and its twin brother, *Oliver* v. *G. W. R. Co.*, and will also possess a value as an independent conclusion founded upon the same state of facts which furnished the premises of the Supreme Court case.

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BOOK REVIEWS.

Oddities of the Law, By FRANKLIN FISKE HEARD. Boston: Soule & Bugbee, 1881.

The title of this neatly got up little book is sufficiently indicative of its varied contents. It contains many good things, and some indifferent things, all odd enough in their ways. There are witty sayings, dicta of Judges, trite maxims of law, curious incidents, quaint phrases, and a host of humorous things which could be described by no other title than that given them by the learned author, unless he had adopted such a one as *Heard's Humorous Hotchpot.*

There are two things coming fairly within the title which the learned gentleman has not noticed, perhaps because they were not within his reach, viz., the Ontario Judicature Act, and the judgment of Mr. Justice Armour in *Miller* v. *G. T. R. Co.*, 45 U. C. R. at p. 226. The former might have swelled the book to an inordinate size, but the latter is short enough to transcribe. While holding that the "Ditches and Watercourses Act" does not apply to corporations, though there is no reason why it should not be extended to them with benefit, his Lordship says:—"Notwithstanding the argument of the defendants' counsel, so powerfully addressed to the nerves, I think corporations such as the defendants should form no exception."

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REVIEW OF EXCHANGES.

American Law Register.—October, 1881.

Preferred Stock, by JOHN D. LAWSON. The subject is divided into two heads. I. The power of corporations to issue preferred stock. II. The rights of holders of preferred stock. The power to issue preferred stock depends either on special statutes or the original charter. Some ordinary shareholders cannot be preferred to others, as the original contract was that all should share rateably. Very general words are sufficient to authorize the corporation to issue preferred stock. The rights of preferred stockholders extends only to priority as to dividends. They are not creditors but partners. They stand in the same relation to the assets and as to the control of the corporation as the ordinary shareholders. Dividends to preferred stockholders cannot be paid out of capital. Where the profits are not large enough in one year to pay the full dividend to preferred stockholders, they are entitled to be paid the arrears out of future profits. By waiving their right to this in one year they do not waive it altogether.

Ibid.—November, 1881.

The Law of Domicile in connection with the right of succession to both Personal and Real Estate, by HUGH WEIGHTMAN. A well digested article upon the conflict of laws relating to legitimacy, etc. English, Scotch and American authorities are reviewed.

American Law Review.—September, 1881.

The Object and Value of the Study of Roman Law, by ADOLPHE L. PINCOFFS. The writer says that the American system of law adopts the feudal classification in a state of society exactly like that of Rome, and contends that the knowledge of, and the comparison with, a system regulating interests so closely resembling their own, cannot but be useful in order to point out the direction in which future legislation must go.

The Slander of a Person in his Calling, by JOHN D. LAWSON. A well digested article, in which the law on the subject is reduced to rules as follows:—I. Words are actionable when spoken of persons touching their respective professions, trades, or business, and do or may probably tend to their damage. II. If he act in the employment, and derive emolument therefrom, his calling may be exalted or humble, his only means of livelihood, or one of several, provided only that it is a legal one, and this it is presumed to be. III. Though a party engaged in an illegal occupation cannot maintain any action for slanderous words directed

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against him in that occupation, yet, if the words concern him as an individual, or in another and legal occupation, an action will lie. IV. The complainant must have carried on the occupation concerning which the slanderous words were spoken at the time they were spoken; but a person once shown to have followed a certain calling, is presumed to continue therein until the contrary is shown, provided it be a trade or calling within the meaning of Rule II. V. The language, to be actionable, must affect him in his particular calling; it is not enough that his general reputation is affected thereby. VI. Where the words have such a relation to the party's occupation that they directly tend to injure him in respect to it, they are actionable, although not applied by the speaker to that occupation; but when they convey only a general imputation upon his character, equally injurious to any one, they are not actionable unless such application be made. VII. It is actionable to impute ignorance where learning and skill are requisite, or dishonesty, where integrity is indispensable, or immorality, where morality is absolutely required, or the absence of any other qualifications which are necessary to the prosecution of a particular profession or calling. VIII. The language, to be actionable, must refer to some act or transaction which is a part of, or incident to, the person's occupation. Illustrations from the reports are given of each material portion of each rule. In fact, the rules are the essence of the cases used as illustrations. A short commentary from the learned writer accompanies each rule.

The Punishment of Attempts and the Defence of Insanity in Capital Cases, by EDWARD B. HILL. The learned writer contends that a failure to complete an attempted crime, by the operation of some cause outside of the active control of the person attempting it, should not affect his position, but that he should be considered as much a criminal as if he had been successful. Three classes of holdings on the theory of the defence of insanity are given. (i) A reasonable doubt of the sanity of the accused is sufficient for acquittal. (ii) The prisoner must establish his insanity by a preponderance of evidence. (iii) The accused must establish his insanity in the same way that the State must establish his guilt, *i. e.*, beyond a reasonable doubt. All three theories exist as rules of law in various States. The writer then propounds the abhorrent doctrine that insanity should not be a defence in capital cases at all, the present notions upon the subject arising from a confusion of ideas upon the province of the law. He founds his theory upon the allegation that human law has nothing to do with the measure of moral guilt of an offender, its only province being to protect the society which establishes it, and to punish such acts as are harmful to society, regardless of their moral aspect; and that its aim is merely to destroy the offender. Comment seems unnecessary.

Ibid.—October, 1881.

Rescission of Divisible Contracts, by R. C. MCMURTRIE. This article is a comparison and discussion of *Pordage* v. *Cole*, 1 Wms. Saunders, 319; *Simpson* v. *Crippen*, L. R. 8 Q. B. 14; *Boone* v. *Ayre*, 1 Saund. 320 *d*. 6th ed., and other cases. The learned writer thus expresses

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himself as to the English law:—"The present English rule is, that there may be rescission for any non-performance, even though the subjects are absolutely separate and the prices apportioned, if nothing be said about the time of performance. But there can be no rescission—that is, a rightful refusal to continue the contract in operation because of non-performance—if the times for performing are divided, or even when they may at the option of one party be divided." The impracticability of the present law for commercial men is pointed out.

Torts of Hospitals, by E. B. CALLENDER. In Massachusetts, a plaintiff who was treated unskilfully and injured by a house pupil in a hospital, and who paid nothing for medical attendance, failed to recover damages. In Rhode Island, a plaintiff in a similar case succeeded. The Massachusetts case was put on the ground that the hospital was a public charitable corporation, paying no dividends. The learned writer thinks that the charity does not screen the negligence, nor will the "gratuity" of the services save the corporation. In the Rhode Island case it was said that for the neglect of the *interne* who treated the patients in not sending for a surgeon, the hospital would be liable, unless it had some ground of exemption. It was held, that as the corporation existed for certain purposes requiring the exercise of care and skill, it was its duty to exercise such skill, and the fact that it acted gratuitously, and had no property of its own, would not exempt it from liability. The learned writer thinks that public policy will not shield the hospitals; for public policy requires that these operations should be performed skilfully, and liability for damages would contribute to insure this.

Implied Warranties on Sales, by THOMAS W. PEIRCE. The general rule of *caveat emptor* is stated. Implied warranties are held to exist, "First, Upon an executory contract, by implication. Secondly, An affirmation of the vendor that the chattel is his, is equivalent to a warranty. The American authorities distinguish between cases where the vendor is in possession (holding that there is a warranty), and cases where he is not in possession (holding that there is no warranty). Thirdly, Warranty with regard to quality is treated of. English and American cases are cited.

Ibid.—November, 1881.

Challenge to the Array, by SEYMOUR D. THOMPSON. Coke is cited for the Common Law. The difference between the selection of jurors at Common Law and that under modern Statutes, is shown, in consequence of which challenge for the partiality of the sheriff, who is merely the messenger of the Court to summon those selected, is becoming obsolete. But where the sheriff is a party to, or interested in, the suit, the Common Law rule has been adhered to in the United States. Under the old law, a selection by a person, two days after he had received his discharge as sheriff, was no cause of challenge. *Aliter*, where the selector derives his authority solely from Statute. O'Connell's case is cited as to incompleteness of the list, and disagreed with by the learned writer. Essential provisions of Statutes

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must be followed in selecting jurors. The duties of selectors are held to be ministerial in the United States, and may be deputed.

Insanity as a Defence, by EDWARD B. HILL. A discussion of the subject at large under the two following heads:—I. What insanity will constitute an excuse for an unlawful act? II. What is the rule of evidence as to the proof of the insanity? In answer to the first question, *McNaughten's case*, 10 C. & F. 200, is accepted by the learned writer as the law, while holding that the weight of principle and reason are against it. As to the second, though some of the United States do not adopt the rule, it is clear, on authority and principle, that a defendant alleging insanity must prove it. Probably a preponderance of evidence will suffice, though the question is not settled.

Re-issued Patents.—The Position of the Supreme Court, by ROWLAND COX. A discussion of some cases upon the rights of patentees of inventions to have their patents reformed.

Central Law Journal.—26th August, 1881.

The Surviving Partner, I., by WM. L. MURFREE, Sr. The death of a partner dissolves the partnership. Each partner is an agent while the partnership exists. After the death of a partner the survivor loses his character of agent, and becomes trustee for all concerned, and is subject to the laws affecting trustees. His powers are then shortly stated by the learned writer. Until a balance is struck upon the settlement of the partnership accounts, the relation of debtor and creditor between the surviving partners and the estate of the deceased does not arise. The cases cited are chiefly American.

Ibid.—2nd September, 1881.

The Surviving Partner, II. The good-will of a commercial partnership is part of the partnership property. In England it is settled that a share of t belongs to the estate of a deceased partner, unless it has been stipulated by express contract that it is to belong to the survivor. The like doctrine prevails in the United States. A different rule prevails as to professional partnerships.

Ibid.—9th September, 1881.

Legislative Journals as Evidence, by C. M. NAPTON. The case of *Rex* v. *Arundel*, Hob. 110, is discussed, where it was held that the Statute roll was a record, and could not be impeached or tried by the Journals of the House. A different doctrine prevails in many of the United States, where the Journals are admitted in evidence.

What Constitutes a Conversion? ANONYMOUS. The origin of the action of trover is stated. On account of a change of ideas the term "conversion" is said to be doubtful in meaning. The learned writer then expresses an opinion that the whole controversy is obsolete, and that the question involved must be fought out on other lines. The question originally to be deter-

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mined was, what exercise of dominion inconsistent with the plaintiff's right of property, was a conversion. The decisions heretofore have exhibited two points of view. One is that every exercise of dominion whereby the true owner's enjoyment of the chattel is derogated from, is a conversion. The other view is from the position of an innocent bailee, who may exercise such acts, and is, that if he, without knowledge of an inconsistent title, fulfils the mandate of the party who bailed the chattel to him, there is no conversion. Forms of actions now being practically a thing of the past, the question of conversion is said to be an obsolete test. "Assume that an act would be tortious if done by some one other than the true owner, without a mandate at all; how can it make any difference that some one gives a mandate who has no title to do so? The true question now seems to be whether there has been a dealing with property unauthorized by the true owner, which has caused damage to him. Once the absolute necessity for a conversion is gone, the measure of damage is not the whole value of the goods.

Ibid.—*16th September*, 1881.

Latent Defects in Goods Sold, by HORACE W. MONCKTON. The learned writer divides his subject as follows:—If the contract has not been fulfilled, there is an end of the matter; and the first question is, What was the contract? Then, was there an express warranty given on the sale? or, if not, does the law imply a warranty? The principle underlying the cases discussed is that, when the buyer trusted in the judgment of the seller, the latter is liable for all defects, whether latent, patent, or discoverable. A number of cases are mentioned, discussed, distinguished, and compared.

What Constitutes a Householder, by W. L. PENFIELD. The privilege of chattel exemption from execution being by the statutes of most of the United States granted to householders, it becomes necessary to arrive at a definite conclusion as to what a householder is. A very intelligent essay is written, in which the question is discussed from a philosophical standpoint; and the distinctions and likenesses between the ancient "family" and the modern "household" are pointed out. American decisions are cited. The question may well arise under our Execution Act, which exempts certain articles in ordinary use by the debtor and his *family*. The ancient family included slaves, who stood not in a contractual relationship to the head of the family, but whose position was one of *status*. The relation of master and servant is a contractual relationship, and must, therefore, be eliminated from consideration in comparing the modern household with the ancient family. The position which people of the same blood hold towards each other who live under the same roof, is one of *status*. Wherever a duty exists from one to another independent of contract, the elements of the ancient family exist. It is probable that this view would be adopted in construing our statutes. It would follow, therefore, that a bachelor, keeping up an establishment, with a large retinue of servants, in which no relative of his resided, would be entitled only to such exemptions as are purely personal in their character. But such a one would not be likely to settle the law.

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Ibid.—*23rd September*, 1881.

Delivery and Acceptance of Deeds, by HENRY WADE ROGERS. In addition to signing and sealing, delivery and acceptance are essential to pass the title of the subject of the grant. What constitutes a delivery is a question dependent upon the facts of each case. Various cases are cited in which the intention to deliver has been deduced from words, acts, or both. The most interesting are those arising under the Registry laws. As a general rule delivery by the grantor to the Registrar for registration, followed by registration, or, in some cases, without registration, is a sufficient delivery. Where, however, a deed was left with the Registrar by the grantor to be registered and forwarded to the grantee, the mailing to the latter was considered to be a condition to be fulfilled before the delivery was complete. Registration is *prima facie* evidence of delivery. A deed left with the Registrar as an escrow cannot be registered at the request of the grantee, who is not entitled to a mandamus to compel registration. Where the deed is to be executed by more than one, delivery by one is incomplete. As to this, see *Piper* v. *Simpson*, ante, p. 197. There must be acceptance by the grantee. Where the deed is for the benefit of the grantee, the law presumes acceptance. As to this, see *In re Dunham*, ante, p. 113.

Ibid.—*30th September*, 1881.

Tampering with the Jury, by SEYMOUR D. THOMPSON. "One who attempts by improper means to influence the verdict of a jury, incurs a threefold liability. He is liable to be punished by the Court for contempt in interfering with its processes; he is indictable at common law for the offence of embracery; and he is liable in a civil action to one who has suffered thereby." Coke's definition of embracery is given. An American case of indictment for such an offence is cited. There is said to be no record of a civil action in the American reports. Judgments obtained by fraud of this nature have probably been dealt with by Courts of Equity. Tampering with the jury is generally made the ground of a new trial Very slight ground is sufficient for this. Since jurors are allowed to go at large pending a trial, with an admonition from the Bench, it is impossible to prevent them from hearing remarks made by officious persons. To disturb a verdict on this ground, obvious or apparent prejudice must be shown. Entertaining the jury, at the expense of the successful party, is ground for interference, without reference to the merits of the case. But this rule has been broken in upon by *Morris* v. *Vivian*, 10 M. & W. 137. Cases of casual, unintentional entertainment are given which have been held not to be ground for disturbing the verdict. The party moving must come into Court with clean hands, and must not have waived his right by acquiescence after knowledge. In criminal cases, the rule is different as to acquiescence, because the prisoner could not exercise a free choice through fear that his refusal would prejudice the jury against him.

Ibid.—*7th October*, 1881.

Convertible Property, by A. J. DONNER, concluded in the following number. The varying ideas upon the meaning of the term conversion

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have enlarged the roll of convertible property, which now embraces every species of personal property. Instances, modern as well as ancient, are given of convertible property. The question of fixtures is touched upon, and cases are cited. "Trover, at common law, lay only for tangible property, capable of being identified and taken into actual possession. The conversion of the property was the gist of the action." Cases are then cited where trover has been maintained for evidences of indebtedness and various documents.

A Prosecutor's Liability for a Judicial Error, by JOHN D. LAWSON. Where the prosecutor merely relates his story to the magistrate, leaving him to determine whether the facts amount to a felony, and there is an absence of malice, the prosecutor will not be liable if the magistrate has misconceived the nature of the act or offence. But a judicial error will still render the prosecutor liable, if it appear that his statement to the magistrate was untrue. Where the defendant, by his fraud or deceit, induces the Court to commit the plaintiff for trial, and is bound over to prosecute, and the prosecution fails, he cannot set up, in answer to an action for malicious prosecution, that the committal was the act of the Court, and that he was bound by the Court to prosecute; for by his silence and fraud the prosecution took place.

Abuse of Process — Measure of Damages, by LOUIS T. MICHENER. Where a license is given by law, and it is abused, the abuser is a trespasser *ab initio*. The common law rule applies to all subordinate executive officers. Wherever the duty of the officer is a duty to the individual, a neglect to perform it properly is an individual wrong, and may support an individual action for the damages. Where the illegal act is the sale of the defendant's property, the measure of damages is the value of the property sold by the officer, where there is no evidence of fraud, malice, etc. The officer cannot plead in mitigation of damages that the proceeds were applied on a debt of such a person.

Ibid.—*28th October*, 1881.

Evidence of Transactions and Communications with a Deceased Person as Affected by the Interest of the Witness, by WM. L. MURFREE, JR., concluded in the following number. The discussion is upon certain Statutes whose effect is that where the suit is by or against the personal representative, assignee, or heirs of a deceased person, the adverse party in interest shall not be permitted to testify to any communication or transaction with the deceased, unless called as a witness by the personal representative, or unless the personal representative is himself sworn as a witness and testifies to the transactions in question.

Ibid.—*4th November*, 1881.

The Right of a Judge or Jury to Question a Witness, by A. G. MCKEAN. The right of both is admitted. The testimony elicited is subjected to the ordinary rules of evidence. But a judge may ask leading questions for his own information. And a party to the cause is not responsible for a juror's improper question.

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Ibid.—*11th November*, 1881.

Dormant Partners, by WM. L. MURFREE, SR. This article cites many English and American cases upon the law affecting secret partners.

Maintenance and Champerty, by CHARLES BURK ELLIOTT. Cites a few American cases and one or two English authorities.

Irish Law Times.—*13th August*, 1881.

Liability of Husbands Separated from their Wives. Continued and concluded in the two following numbers. If the wife of her own fault leave her husband, she leaves her authority as his agent behind her, and *a fortiori*, if she commit adultery. But his liability revives on waiver or condonation. The onus is on the person claiming against the husband to prove separation, and the implied authority thereon. Where separated, is the wife liable on her own contracts? She has been held liable on the ground that she represented herself to be a *feme sole*, and contracted as such. American writers differ. The negative opinion is said to be the better one. On separation by mutual consent; if she agrees to accept a sum in full for her support, and stipulates not to contract in her husband's name, she cannot do so. The adequacy of the allowance is immaterial, if she agrees to accept it as sufficient, and it makes no difference if the income is derived from her separate property. When the husband wrongfully turns away his wife, or she leaves him through his fault, she is entitled to procure on his credit such articles as are necessary for her support and maintenance. A constructive turning away is sufficient, and the husband cannot relieve himself by notice in newspapers or to individuals. Where the wife has separate property sufficient for her support, the husband is not necessarily liable. A person who has advanced money for the purchase of necessaries for the wife's support, may recover the same in equity from the husband.

Ibid.—*3rd September*, 1881.

Solicitor's Charging Lien on Moneys of Client. Concluded in following number. Two cases are made the text of the learned writer's observations, viz.: *Emden* v. *Carte*, 44 L. T. N. S. 840, and *In re Knapp*, 24 Alb. L. J. 106. "The general proposition that an attorney has a lien for his costs and charges upon deeds or papers, or upon moneys received by him on his client's behalf in the course of his employment, is not doubted." If he applies to the Court they will prevent the payment over of money till his demand is satisfied. He is not bound to remain passive, but authority shows that he may actively enforce his lien. He cannot carry a writ of execution into effect against the instructions of his client with a view to obtain his costs, even though the parties should collude to deprive him of his lien: 12 N. & W. 451; 1 Marsh. R. 114. As to his proper method of procedure, see *Morgan* v. *Holland*, 7 Pr. R. 74. The Solicitors' Act, 1860, and other statutes, are then noted. The attorney is entitled to a lien on money recovered by arbitration.

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Ibid.—17th September, 1881.

Solicitors' Remuneration is a short review of some of the provisions of the Solicitors' Remuneration Act, 1881.

Ibid.—24th September, 1881.

Liability of Servant for Negligent Injury to Co-Servant. Continued and concluded in the two following numbers. In *Southcote* v. *Stanley*, 1 H. & N. 247, "Pollock, C.B., after affirming the Master's exemption from liability, explicitly laid down that 'neither can one servant maintain an action against another for negligence whilst engaged in their common employment.'" In *Albro* v. *Jaquith*, 4 Gray, 99 (cited in Sm., M. & S. p. 217), it was expressly held that the servant would have no remedy against his fellow-servant. *Aliter* in Scotland. *Sherman & Redfield*, s. 112, think that the action lies. And this is now the law in Massachusetts (the State in which *Albro* v. *Jaquith* was decided), for *Osborne* v. *Morgan* decided this year expressly over-ruled *Albro's* case. *Osborne* v. *Morgan* is reported in 12 Cent. L. J. 448; 23 Alb. L. J. 408; 20 Am. L. Reg. 399; 11 Rep. 841. And in his evidence before the House of Commons Committee on Employers' Liability, Bramwell, B., gave it as his opinion that a workman "would undoubtedly be able to maintain an action against the fellow-workman who had done the mischief." Brett L. J. was of the same opinion. And in *Swainson* v. *N. E. R'y. Co.*, L. R. 3 Ex. D. 341, and *Wiggett* v. *Fox*, 11 Ex. 832, there are *dicta* to the same effect.

Ibid.—15th October, 1881.

Legal Procedure. A Review of the Report of the Committee on Legal Procedure. Some caustic remarks are made and quoted upon the wisdom of superseding a system of pleading, whose fault lay in the excessive skill employed in framing pleadings by one whose characteristics are verbosity and uncertainty.

Ibid.—29th October, 1881.

The Right to Manacle Prisoners. "An unconvicted prisoner ought not to be manacled, unless there is reasonable ground to fear an attempt at escape or rescue." At the trial, it is a question for the discretion of the judge.

Law Journal.—13th August, 1881.

Brewers' Leases. A case of *Edwick* v. *Howken*, reported in the August number of the *Law Journal* Reports, is discussed. The defendants leased a public house to the plaintiff, who covenanted that he would purchase of the lessors all beer, etc., that should be consumed upon the premises. Proviso for re-entry on breach or non-observance of covenants. The brewers made two kinds of ale, one cheaper than the other, the cheaper kind being sold to ordinary customers, the other to the leased public houses. The plaintiff, instead of buying the beer himself, employed a carrier to buy it at a discount, and bought more cheaply than if he had

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dealt directly with his lessors. Mr. Justice Fry held that the condition had not been broken. The parties supposing the lease to have been forfeited, met, and the plaintiff signed a license to the lessors to enter in twenty days and eject him without process, which was done. It was held that this license was revocable. Large damages were awarded for the forcible entry and injuries done. The decision illustrates that the law now is that a civil action may be maintained under the Statute against forcible entry.

Ibid.—*27th August*, 1881.

Solicitor and Town Agent. A case of *In re Johnson, ex parte Edwards*, reported in the August number of the *Law Journal* Reports, is discussed. A country solicitor owed money to his London agent, who received the proceeds of a suit and gave credit to his principal for it on the debt. It was held that the client might proceed summarily against the London solicitor for the proceeds.

Ibid.—*3rd September*, 1881.

Bathing and Baths. The case of *Blundell* v. *Cotterall*, 5 B. & Ald. 268, decides that the public have no Common Law right of crossing the seashore on foot, or with bathing machines, for the purpose of bathing in the sea. Some remarks upon this case, and generally upon local laws, follow.

Ibid.—*1st October*, 1881.

Damages for catching Cold. *Hobbs* v. *The London, etc., R'y. Co.*, 44 L. J. Rep. Q. B. 49, and *McMahon* v. *Field*, reported in the September number of the *Law Journal* Reports, are examined and distinguished. In the former, the Hobbs family returned from a day at Winbledon by the defendants' railway. They were told that the train would stop at Hampton Court Station about three miles from their home, but it passed on to a distance of six miles from their home. The night was wet and chilly, and Mrs. Hobbs caught cold, for which a jury gave damages; but the Court decided they were not recoverable. In the latter case, the defendant undertook to provide stabling for the plaintiff's horses during a fair. The horses were put under shelter, but were afterwards turned out without clothing to make room for other horses. The horses caught cold while the plaintiff was looking for other stabling, and the plaintiff was held entitled to damages. The cases seem undistinguishable, but it is pointed out that, in the latter case, the contract was for shelter, and as the horses' cold resulted from want of shelter, it was a direct result of the breach of contract. In the Hobbs' case the contract was to carry from place to place, and the catching cold could not be directly referred to the carriage to the wrong place; for Mrs. Hobbs might have caught cold in going the three miles which she would have had to go, if she had been carried to the station she desired to stop at.

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Ibid.—8th October, 1881.

Cairns' Conveyancing Act. Some of the notable points of this Statute, which contains many extraordinary provisions, are pointed out. We may have occasion to refer to it more fully again.

Ibid.—15th October, 1881.

The Proposed New Procedure. The suggestions of the judges and lawyers, who, at the request of the Lord Chancellor, considered the reform of legal procedure, are reviewed. Among the suggestions are the abolition of pleadings except where allowed by order of a judge, and the limitations of appeals from chambers. One of the most important is the limitation of trial by jury. If neither side makes a move in the direction of a jury, the case is to be tried by a judge. Either party may ask for a jury, when an order shall be made that the cause be tried by a jury, if it shall appear that the questions involved can conveniently be so tried. Actions of libel, slander, seduction, false imprisonment, malicious prosecution, and breach of promise of marriage, are excepted. Two suggestions look as if they might have been borrowed from the Ontario practice; the one is, that there should be a shorthand writer in each Court—the other, that there should be a jury list and a non-jury list. The want of a series of practice reports is severely felt.

Contracts for Sale under Cairns' Conveyancing Act. Notes upon the clause relating to contracts of sale.

Ibid.—22nd October, 1881.

The Cause of Action for Negligence. The case of the Margaret, 50 L. J. Rep. P. D. & A. 3, is discussed, and the admiralty rule contrasted with the common law rule as to negligence. A barge collided with a schooner, through the fault of the navigators of the barge. The schooner's anchor was hanging from the bow, with the stock somewhat above the waterline, contrary to the rules of the Thames Conservancy. The fluke of the anchor damaged the barge, and the schooner was held liable for half the damages, both being in fault, though the barge was the primary cause of the damage. "The barge was damaged by negligently driving itself against the anchor of the schooner, which she negligently carried. Which was the cause of the damage? The negligence producing the collision, or the negligence producing the damage? On the one hand, without the collision, there would have been no damage; on the other, there would have been no damage without the anchor being where it was. Common sense replies that both were in the wrong; and the admiralty rule applies that conclusion by dividing the damage equally." The rule would hardly apply to negligence on land.

Ibid.—29th October, 1881.

The Law of Bicycles and Tricycles. A tricycle, which was furnished with steam power, upon a miniature scale, as an auxiliary force, was held to be within the Locomotives Act. Bicycle and tricycle law is thus

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summed up:—"They are carriages, so as to have the guilt of furious driving laid at their door; they are not carriages, if asked to pay toll at a turnpike gate; but they are as much locomotives as traction engines, if they eke out their powers of endurance with steam, be it ever so little, or ever so carefully stowed away."

Law Magazine and Review.—August, 1881.

Sheriffs and Sheriff Courts in Scotland, by J. M. LEES. A descriptive review of the Sheriff Courts, their officers and jurisdiction. Their jurisdiction is invoked in almost every conceivable manner of case. The Small Debts Courts bear a striking resemblance to our Division Courts.

The Laws of Wales.—The Kindred and the Blood Feud, by F. W. MAITLAND. A historical review of some of the principles and practices of the ancient laws of Wales.

The Growth of the Grand Jury System, by JOHN KINGHORN. In its early history an aggrieved person had to wait for the sitting of the Grand Jury to make his complaint, and they were bound to present the accused if a reasonably strong suspicion were raised against him. It is said that "the neglect or omission to prosecute before the Grand Jury usually entitled the wrong doer, who was in custody, to a receipt in full down to that date, and he could not afterwards be called on to answer for anything done before the last assembling of the Grand Inquest. It was in view of this immunity that the 'proclamation for the King,' which is still made by the crier of the Court where a prisoner is given in charge to the Petty Jury, and the now obsolete form of discharging prisoners by proclamation at the end of the Assizes, were observed" It was decided at the trial of the Earl of Shaftesbury, in 1681, that the evidence should be taken in open Court, as of right, if the King required it, though the Grand Jury were entitled to deliberate and debate in secret. The learned writer, however, shows that the practice of taking the evidence publicly was an exception to the general practice. The privacy which the Grand Jury contended for on Shaftesbury's trial is now completely assured.

Southern Law Review.—April-May, 1881.

Frauds in Chattel Mortgages, by LEONARD A. JONES. Fraud arising from the Mortgagor's continued possession without record, is first discussed. May's opinion is cited, and the result of American cases is then given in the words of a writer in the *Central Law Journal*, to the effect that "possession is a link in a chain of circumstances pertinent in proving fraud, having greater or less weight, according to the circumstances of each case." The effect of statutes requiring registration of a document or delivery of possession, is reviewed. The doctrine that, where things are incapable of delivery, they are not within the statute which makes retention of possession fraudulent *per se*, has been adopted in Pennsylvania. Growing crops are within this rule. This is in conformity with the latest

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decisions of our Queen's Bench, *Hamilton* v. *Harrison*, 1 C. L. T. Occ. N. 424. Mortgages of consumable property next receive attention. Possession of consumable property which is consumed by the mortgagor is some evidence of fraud. All goods are consumable to this extent that they perish or depreciate in the using. A mortgage of crops, cattle, etc., for several years, is not necessarily fraudulent as to the crops which must be consumed before the mortgage matures, for, indirectly, they may, and actually do, to a certain extent, minister to the support of the cattle. In a mortgage of merchandise, a power reserved to the mortgagor to sell the mortgaged goods, in the usual course of the trade, is said not to render the mortgage fraudulent *per se*. There is an implied license to a trader who gives a mortgage upon merchandise to carry on his trade. In some of the United States, however, such a mortgage has been adjudged fraudulent.

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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[OSLER, J., 1ST NOVEMBER, 1881.

JONES v. THE CANADA CENTRAL RAILWAY CO.

Private Act—Effect of—Jurisdiction of Local Legislature—Domicile of party affected—Demurrer.

The plaintiff, being the holder of a debenture issued by the B. & O. Railway Co. under 23 Vict. cap. 109, sued thereon. By the 27 Vict. cap. 57, the Railway Co. were authorized to issue preferential bonds and to execute a mortgage to a trustee to secure payment thereof. The Railway being at the time of Confederation a local work, the 31 Vict. cap. 44 (O.) was passed, which recited that the trustee was in possession and about to foreclose the mortgage, and, amongst other things, directed that the debentures (therein called ordinary bonds) should be converted into stock, at a certain rate on the dollar; and that the holders thereof should have no other claim on the Company than for conversion of their debentures into stock. By the 41 Vict. cap. 36 (D.) the B. & O. Railway Co. and the defendant Co. were amalgamated. The defendants set up that their liability on the debentures in question was extinguished by the 31 Vict. cap. 44 (O.), and that they were ready and willing to take the debentures in exchange for reduced stock thereunder. 3rd replication, that the Act was not binding upon the plaintiff because it was a private Act, and he was not named therein nor a petitioner therefor, nor were his rights

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specially taken away thereby. 4th replication, that the Act is *ultra vires*, because the debenture was payable in London, England, and was there domiciliated, and the holder resided there at the time of the passing of the Act beyond the jurisdiction of the Ontario Legislature. Demurrer.

Held, 3rd replication bad; for though the Ontario Act was in the nature of a private Act, it sufficiently referred to the plaintiff by referring to the class of bondholders to which he belonged, and that he was therefore bound thereby.

Held, 4th replication bad. The local legislature were not restricted by the term "property and civil rights in the Province" to legislation respecting bonds held therein. Where a debt or other obligation is authorized to be contracted under a local Act passed in relation to a matter within the power of the local legislature, such debt may be dealt with by subsequent Acts of the same legislature, notwithstanding that it may be domiciliated out of the Province.

G. H. Watson, for the demurrer.

G. A. Mackenzie, contra.

[4TH NOVEMBER, 1881.

REGINA v. PALMER.

Liquor License Act—Licensed premises.

The defendant was licensed to sell "in and upon the premises known as Palmer House." The Palmer House stood on the front of a deep lot owned by the defendant, the rear part of which had been for many years enclosed and used as a fair ground. Facing the fair ground, and opening thereon, was a booth, the back of which formed part of a fence which separated the fair ground from the yard in the rear of the hotel. The defendant was convicted for selling in this booth.

Held, that, as the fair ground, though part of the lot on which the hotel stood, was not used in connection with or for the enjoyment of the hotel, it was not covered by the license, and the conviction was right. (See *Regina* v. *Fraser*, ante, p. 616.)

Fenton, for the conviction.

Murphy, contra.

[15TH NOVEMBER, 1881.

In re STAYNER, *et al.*

Village—Statute Labour—Ultra vires.

There is no liability to perform statute labour in a village municipality, and a by-law providing for its commutation is *ultra vires* and void.

McCarthy, Q.C., for the motion.

Lount, Q.C., contra.

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CHANCERY DIVISION.

[THE CHANCELLOR, 26TH OCTOBER, 1881.

BURROWS v. LEAVENS.

Conveyance by illiterate person.

A married woman was asked to join in a mortgage of her husband's real estate as a granting and covenanting party, she having already refused to mortgage her own real estate for her husband's benefit. The mortgage was not properly explained to her, and she thought she was only barring her dower in her husband's land.

Held, that, as there was no intention on the part of the married woman to contract with respect to her separate estate, the covenant was invalid, and did not bind it.

IN CHAMBERS.

[THE CHANCELLOR, 31ST OCTOBER, 1881.

HUGHES v. REES.

Referee's duty—Rule 426.

An application for a commission was made to the Official Referee, who referred the same to a Judge.

Held, that it was his duty to have disposed of the motion in the usual way, it being a matter within his own jurisdiction, subject to appeal if either party were dissatisfied. The motion might, however, be heard under rule 426; but, in that case, only on a certificate from the Referee that in his opinion the motion was a proper one to be heard by a Judge.

Morphy, for the motion.

J. Hoskin, Q.C., *Donovan* and *Kingsford*, for the several defendants.

In re FLEURY; FLEURY v. FLEURY.

Partition—Motion for distribution—Costs.

The commission allowed under G. O. 640, in partition suits includes all costs; and the costs of a motion for distribution will not be allowed in addition to the commission.

Crickmore, for the application.

G. H. Watson, contra.

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[1ST NOVEMBER, 1881.

LEESON v. LEMON.

Interpleader issue—Jury notice—Irregularity.

Held, affirming the order of the Official Referee, that serving a jury notice with the notice of trial instead of with the issue is an irregularity and not a nullity, and is waived by not being moved against.

Hodgins, Q.C., for the appeal.

Reeve, contra.

In re JAMES.

Lunatic—Contract—Liability.

Held, affirming the ruling of the Master at Woodstock, that the estate of a lunatic, who had received no consideration for the indorsement of a promissory note, was not liable to his indorsee thereupon, though the latter was not aware of the lunacy.

W. Roaf, for the appeal.

[PROUDFOOT, J., 10TH OCTOBER, 1881.

Re DEVITT.

Jurisdiction of Master in Chambers—Confirmation of order—Rule 424—Practice.

A motion by petition for the sale of infants' estate, and for the application and distribution of the proceeds.

The Official Referee made the order, subject to confirmation by a Judge in Chambers so far as his jurisdiction did not extend.

Proudfoot, J. confirmed the order, holding that the Official Referee should continue to exercise the jurisdiction formerly vested in him in such matters, subject only to the confirmation of so much of his order as directed the distribution and payment out of Court of the moneys to be realized.

H. Cassels, for the applicant.

[11TH NOVEMBER, 1881.

In re DONOVAN; WILSON v. BEATTY.

Solicitor and client.—Payment of moneys.

A solicitor, acting for H. administrator *ad litem* of an estate, carried on litigation, and brought in bills of costs which were allowed to H. in

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passing his accounts to the amount of $2,738.37. In a subsequent suit against H., as such administrator, these bills were subjected to taxation, and a sum of $2,012.81 was deducted, with costs, $114.50, which sums H. was ordered to pay. The money not being collected from H., the executors obtained leave to sue his sureties, and, at their instance, applied for an order that the solicitor pay the money or be struck off.

Held, that the executors were entitled to this relief; and the solicitor was ordered to pay $2,127.31 into Court within one month.

[15TH NOVEMBER, 1881.

DALE v. HALL.

Production—Time for.

Held, that a plaintiff is entitled to an order for production immediately after the expiration of the time for delivery of the statement of defence, whether the statement of defence has been delivered or not.

H. Cassels, for the application.

In re WILSON; LLOYD v. TICHBORNE.

Administration—Infants' right.

An application on behalf of the widow and infant children of a testator for administration of the estate. The debts had all been paid, but misconduct was charged against the executor.

Held, that infants have a right to an administration order on the mere suggestion of their next friend that it would be for their benefit.

Langton, for the motion.

Hoyles, contra.

[16TH NOVEMBER, 1881.

THE BOARD OF EDUCATION OF NAPANEE v. THE MUNICIPAL CORPORATION OF NAPANEE.

School trustees—School site—Mandamus—Practice.

A municipal corporation has no discretion in accepting or rejecting the requisition of school trustees for funds for a school site, except by a two-thirds vote. An adverse vote by a smaller majority is a virtual acceptance, and the requisition must therefore be complied with.

Under R. S. O. cap. 40, sec. 86; cap. 49, sec. 21, and cap. 52, ss. 4, et seq., the Court of Chancery could exercise the powers of a court of law in any proceeding, and the powers of the Common Law Courts to grant man-

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damus upon motion not being by the latter act restricted, the Court of Chancery might also have granted a mandamus upon motion; and under the Judicature Act, nothing appearing to restrict the jurisdiction, the Chancery Division of the High Court of Justice has the same jurisdiction.

S. H. Blake, Q.C., and *Meek*, for the plaintiffs.

Bethune, Q.C., and *Hoyles*, for the defendants.

[17TH NOVEMBER, 1881.

CRAWFORD v. CRAWFORD.

Lunatic--Guardian ad litem—Rule 69.

An application for an order under Rule 69, assigning a guardian to a lunatic not so found by inquisition, should be made to the Master in Chambers or the Official Referee.

Denovan (*Mulock & Co.*), for the motion.

[18TH NOVEMBER, 1881.

BARKER v. LEESON.

Interpleader issue—Power of C. C. Judge at trial.

An interpleader issue had been directed by the Court of Chancery to be tried by a jury at a sittings of the County Court. A verdict was there entered for the plaintiff The County Court Judge subsequently made absolute a rule to set aside the verdict and to enter a non-suit. An application was made to the Master in Chambers for an order for costs, etc.

Held, affirming the decision of the Master in Chambers, that the County Court Judge had no power to set aside the verdict and enter a nonsuit as the questions of law arising on the issue should be disposed of by the Court which had directed the facts to be ascertained by the trial of the issue.

The learned Judge desired to express no opinion as to whether the County Court Judge had power to reserve the question whether the evidence was sufficient to establish the plaintiff's case.

Bain, for the appeal.

Reeve, contra.

[OSLER, J., 5TH OCTOBER, 1881

GLASS v. GLASS.

Ejectment—Dower—Counterclaim.

In an action of ejectment against a widow, she may set up a counterclaim for dower out of the land in question.

Holman, for plaintiff.

Van Norman, Q.C., contra.

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MERCHANTS' BANK v. CAMPBELL.

Fi. fa. lands—Poundage.

A sheriff is not entitled to poundage upon an execution against lands unless there has been an actual sale.

[14TH OCTOBER, 1881.

ROBERTSON v. COULTON.

Arrest—Capias—Commencement of action—Affidavits—Amendment.

In an action commenced by specially endorsed writ of summons, the defendant was arrested on a capias in the form of a *ca. re.* before action, and gave bail to the sheriff. The affidavit upon which the order for arrest was obtained did not fully specify the cause of action, and was not entitled in any cause, nor in the Division of the High Court of Justice to which the action was assigned. The defendant applied to have his arrest set aside.

Held, (i) that a capias is now a proceeding in an action, and that the action had been properly commenced by writ of summons. (ii) That the writ of capias and copy might be amended, so as to make it a capias after action. (iii) That the special endorsement on the writ of summons sufficiently showed the cause of action, and the plaintiff should have liberty to file an affidavit *nunc pro tunc* proving the same. (iv) That the affidavit originally filed might be amended by adding thereto the style of cause and name of the Division to which the action had been assigned. (v) That the fact that defendant intended to leave the country without satisfying his debts, raising a suspicion in the plaintiff's mind, was enough to justify his arrest, the debt not being denied.

H. J. Scott, for the defendant.

Perdue, contra.

In re TURNER v. THE IMPERIAL BANK.

Division Court Act, 1880—*Interpleader—Appeal.*

There is no appeal from a Division Court in an interpleader suit, even where the amount in dispute exceeds $100.

Haverson, for the plaintiff.

Shepley, for the defendants.

[20TH OCTOBER, 1881.

REGINA v. ALLBRIGHT.

Liquor License Act—Certiorari—Hard labour—Amendment of conviction.

Defendant was convicted for the third time of having sold liquor without a license, and was sentenced by a magistrate to three months' imprisonment with hard labour.

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Held, that the magistrate had no power to impose hard labour, the provision in that behalf in the Liquor License Act being *ultra vires*.

Where a conviction is irregular in the sentencing part, and an application is made on a certiorari to quash it, the Court will not grant an amendment of the conviction.

Foster, for the prisoner.
Hodgins, *Q.C.*, contra.

[1ST NOVEMBER, 1881.

REGINA v. DUQUETTE.

Liquor License Act—Dickinson's Island—Indian lands.

Held, that Dickinson's Island is part of the County of Glengarry in the Province of Ontario, and, therefore, subject to the Liquor License Act.

Held, also that this Act applies to Indian lands under lease from the Crown to a private individual.

Held, also, that only the holder of a license can be prosecuted under section 43 of the Act for selling liquor at prohibited times.

Aylesworth, for the application for a *certiorari*.

In re GAUTHREAUX'S BAIL.

Bail—Estreat—Recitals in recognizance.

A recognizance of bail recited that the prisoner had been indicted at the Court of General Sessions of the Peace for two separate offences, and was conditioned that he should appear at the next sittings of said Court and plead to such indictment as might be found against him by the grand jury. The accused did not appear at the then next sittings and no new indictment was preferred against him.

Held, that the recitals sufficiently shewed that the accused was to appear and answer the indictments already preferred, and that an order estreating the recognizance was properly made.

Murphy, for the motion.

[19TH NOVEMBER, 1881.

HUGHES v. FIELD.

Absconding Debtors Act—Prior judgment—Costs of attachment—Rule 427 (b).

M. was first judgment creditor of the defendant, and, under her execution, sold all his exigible property, which partially satisfied her judgment. Before she had obtained her judgment the defendant absconded, and writs

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of attachment issued against him; and the sheriff seized all the property, including book debts, and realized thereon, of which all except the book debts went to satisfy M.'s execution. The plaintiffs obtained an *ex parte* order under section 20 of the Absconding Debtors Act, for the costs of suing out and executing their writ of attachment to be paid prior to M.'s judgment, without disclosing to the Master in Chambers that they were third attaching creditors in point of time, and that there was a fund (viz., the book debts), in which the attaching creditors alone would be entitled to share, they not being exigible under M.'s execution. Under this order, they taxed the costs of the order, added them to their whole costs of the attachment proceedings which had been taxed on signing judgment for their debt, and issued execution therefor. A motion was made by M. to set aside this order and the subsequent proceedings.

Held, that the object of section 20 of the Absconding Debtors Act is to save harmless the *bona fide* attaching creditor whose writ has had the effect of saving and protecting the debtor's property for the execution creditor; but where there is a fund not exigible under the execution to which an attaching creditor alone is entitled, there is no reason for making such an order; and where there are several attachments, and the whole property has been seized and sold or retained under the first writ, the costs of that writ only should be allowed.

The notice of motion to rescind the order was served the day after the order was served on M.'s solicitors, but this was more than four days from its date.

Held, that the application, not being an appeal, but an application to set aside an order made without knowledge of the facts, was therefore not within Rule 427 (*b*).

Held, also, that the costs of suing out and executing the writ of attachment mean the costs of the writ itself and the sheriff's fees and charges, and not the whole costs of suit.

E. Douglas Armour, for the motion.

C. Millar, contra.

[THE MASTER IN CHAMBERS, 24TH OCTOBER, 1881.

SAWYER v. SHORT.

Notice of trial— Close of pleadings—Rule 494.

Notice of trial may be served and the cause set down for trial without a replication being filed in an action in the Chancery Division, which, on the 22nd August, was at a stage at which notice of motion for Decree might have been served or a replication filed.

Hoyles, for the motion.

H. Cassels, contra.

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In the Queen's Bench.

[THE FULL COURT, MAY, 1881.

GRANT v. O'HARE.

Ejectment—Mortgage—Possession.

Hugh O'Hare purchased the land in question and took a deed dated 30th April, 1870. His brother James, the defendant, paid a small portion of the money, and immediately went into possession. Hugh occasionally visited the place. On 30th November, 1874, Hugh mortgaged to the plaintiff, who issued his writ 25th February, 1881. The defendant claimed title by possession.

Held, that this defence could only succeed by counting defendant's possession from the date of his entry, but in any event the Statute would not commence to run until a year from that date. Rule to set aside verdict for plaintiff refused.

Wallbridge, Q.C., for the rule.

[26TH NOVEMBER, 1881.

PHILLIPS v. GRAND RIVER FARMERS' MUTUAL FIRE INSURANCE CO.

Mutual Fire Insurance Company — Misrepresentation — Encumbrances—Fixtures—Waiver—Divisible Contract.

The plaintiff and his brother, being joint owners of land which their father had conveyed to them subject to a mortgage to C., gave a mortgage to the father to secure the purchase money, the father covenanting to pay C.'s mortgage. Under an agreement with his father and brother, the plaintiff, at his own expense, built a dwelling house for his own use on a quarter of an acre of the land, the agreement being that if the brother should not be able to pay for the land the plaintiff should have the house as his own. The house was placed on blocks of wood, and was held by its own weight on them. The plaintiff represented to the defendant's agent that, though there was something due on the land, there was nothing against the house, which he held in fee unencumbered. There was a condition on the policy that encumbrances should be revealed, and that failure to do so would avoid the policy. The verdict was for the plaintiff.

Held, on the evidence (Armour, J., dissenting), that the house was not a chattel, but a fixture, and would have passed under a conveyance of the land; nor was it insured as a chattel; and that the failure to disclose the encumbrance was fatal.

The policy covered the household goods in the house;

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Held, that the misrepresentation did not affect the chattel property, and that the verdict should be reduced and stand for the value of their loss.

The Directors passed a resolution to pay the loss, in ignorance of the fact that the encumbrance existed, and made an assessment to meet it, but, on discovery, rescinded this resolution.

Held, that the defendants had not by the resolution waived their right to set up the defence.

J. K. Kerr, Q.C., for the plaintiff.
Hardy, Q.C., for the defendants.

FRASER v. McLEAN.

Composition and Release—Fraud—Right to sue for balance of debt.

An arrangement between the plaintiff and the defendant, his debtor, was entered into, whereby the plaintiff took, at a valuation, on account of his debt, certain timber limits and chattel property, and received some money thereunder, and released the defendant. By a cotemporaneous deed, which the Court held to form with the plaintiff an entire transaction, the defendant compromised with his creditors. The defendant procured the assent to the arrangement by deceit.

Held (Armour, J., dissenting), that the plaintiff could refuse to be bound by the deed, provided only that he should repudiate the whole and not seek to retain some of the benefits thereunder; and not having disaffirmed the transaction, nor offered to replace the defendant in the situation he had occupied before the transaction, he was rightly nonsuited.

Per Armour, J. The composition having been obtained by fraud, the plaintiff was entitled to sue for the balance of his debt, retaining the property and money received and giving credit therefor to the defendant.

Bethune, Q.C., for the plaintiff.
McCarthy, Q.C., and *Chrysler*, for the defendant.

NOVA SCOTIA.

[Before the Full Court.]

[5TH APRIL, 1881.

FITZRANDOLH v. SHANLY.

Representations—Estoppel—Garnishee—Equitable assignment.

Plaintiff held a judgment against one George Cutten, and was about to sue Ryerson, Moses & Co., whom he understood to be Cutten's partners. Before doing so he consulted one of the defendants, by whom he was

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informed that there was a balance of some $2,700 due from the defendants to Cutten for work performed for the defendants on the Western Counties Railway under a contract, and defendants suggested that this amount might be made available to satisfy plaintiff's claim if there was a garnishee law. Plaintiff, acting on this representation, issued garnishee process, when defendants pleaded, denying that there was any debt due.

Held, that defendants were estopped by their representation from denying their indebtedness to Cutten.

Previous to the garnishee process being issued Cutten had drawn an order, requesting defendants to pay all sums coming due to him under the engineer's monthly certificates to one Killam, but there was no evidence of any indebtedness of Cutten to Killam.

Held, that this was not an equitable assignment that would prevent the attachment from operating on the fund.

JOHNSTON v. POYNTZ.

Debtors' relief—Provincial Legislature ultra vires.

The Act of the Provincial Legislature, 1878, cap. 8, providing for the relief of debtors imprisoned on process out of the County Courts is not *ultra vires*.

An action was tried in the County Court in February, 1878, before the passage of the Act, against commissioners for discharging a debtor imprisoned on process out of the County Court, but the judgment, which was in plaintiff's favour with eight dollars damages, was not pronounced until December, 1878, the Act having passed in April, 1878, one clause of which provides that "No action in any Court shall be taken or sustained by reason of proceedings theretofore taken for the relief of such debtors being illegal, invalid or void." An appeal from this judgment was sustained with costs, each party paying his own costs in the Court below.

[Before the Court in Banc.]

AYLWARD v. AYLWARD.

Will—Partition—Laches.

James Aylward, by his will, directed as follows: "I recommend to my wife, whom I ordain my executrix, and J. B. and A. F., executors, that at the discretion of my widow, when she may deem proper, they, with her, may dispose of my real estate to which of my sons may incline to give the best price and to assist her in making an equal division thereof among my five sons." The executors renounced, and the widow conveyed the property, December 1st, 1850, to John Aylward, who conveyed it to one

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Duncan, December 24th, 1850. Both deeds were recorded January 5th, 1852. The heirs of Duncan conveyed it in 1868 to Merrit and Bligh by deed recorded in 1869. In October, 1871, Edward Aylward commenced proceedings for a partition, claiming that the widow had conveyed the land secretly to John Aylward, and in his evidence stated that he had never been asked by the widow or the executors to offer for the land, and was not aware of the deed to John Aylward until about a year after its date; but it did not appear that he had ever objected to the title of John Aylward under the deed, or called in question the title of Duncan or those deriving title from his heirs, and he did not assert that he was willing to give more than John had given, or that the land was worth more.

Held, that in view of the lapse of time and the adverse possession, it was too late to attempt to defeat the title of Merrit and Bligh on the verbal evidence of petitioner that an option had not been given.

Quære, whether title can be tried in proceedings for partition. See *LeCain* v. *Hosterman*, 2 N. S. Dec. 413.

Re NICTAUX AND ATLANTIC RAILWAY.

Railway—Appraisement of lands—Technicality.

The Act incorporating the company for the construction of the Nictaux and Atlantic Railway provided that the land required for the road, etc., should be furnished gratis to the company, who were authorized to exercise all the powers necessary for locating and completing the railway, and the company was empowered to build the road "under the powers, authorities and provisions of this Act (the Act of Incorporation), and also of chapter 70 of Provincial Government Railways, so far as the same shall be applicable to such railway."

Held, that, although sections 44 to 59 of chapter 70, providing for appraisement of the lands taken and assessment of the county were not expressly embodied in the Act of Incorporation, they were available for the purpose of making the appraisement and assessment.

Held, further, that the objections that the application for a jury was made to, and the order granted by, the Court on Circuit, instead of a Judge of the Court, and the objection that the venire was not filed within thirty days, were obviated by section 52 of chapter 70, providing that proceedings should not be set aside upon any mere technicality.

Held, further, that the objection that plans and specifications were not on file as required by section 47 of chapter 70 when the order passed, even if it could be raised by the parties whose lands had been taken, could not be taken by the county authorities at whose instance the proceedings had been taken, and that the same principle applied to the contention that the Act contemplated only one appraisement, and that all the plans and specifications for the whole line must be filed before the order.

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TRUSTEES OF PUBLIC PROPERTY v. KERR.

Laches—Estoppel—Expenditure under belief of title.

Plaintiffs, as trustees of public property for Argyle, claimed to be entitled to land alleged to have been granted for a Court House in Tusket Village The grant of a village, made in 1809, did not mention the Court House, but the lot in dispute was set off for a Court House on the accompanying plan. In 1858, the same lot was granted to trustees of public property for Tusket for public uses; and it was under those grants and the Statute R. S. 4th series, cap. 38, that plaintiff claimed.

In 1822 the adjoining lot passed to one Crowell, who conveyed it in 1832 to James Bingay, who took possession, more or less, of all the Court House lot not actually used for Court House purposes.

In 1853 ejectment was brought against him by trustees of public property, Yarmouth, which was compromised, Bingay conveying to the trustees a part of the land then in dispute, and plaintiffs paying his costs. This conveyance was recognized by the sessions, in 1859 and in 1864. After the trustees had again agitated the question, the sessions resolved to relinquish all claims to the so-called Court House lot. Defendant bought the lands without the knowledge of plaintiffs' claim, at a public sale, which was not forbidden by the trustees, one of whom was a purchaser, and fine buildings were erected on it before the plaintiffs brought their action.

Held, that the equitable principles, prohibiting the disturbance of settlements long acquiesced in and prohibiting a party from lying by and reaping the benefit of the expenditure of another's money on his property, applied to the plaintiffs, and that the judgment of the Court must be for defendant.

CITY OF HALIFAX v. ROMANS.

Salaried attorney—Costs.

The city ordinances authorized the Council to appoint a recorder at a salary in lieu of all services, and made it his duty to act for the City as counsel and attorney.

Held, that, notwithstanding the recorder was a salaried officer, and could not have taxed costs as between attorney and client, the plaintiffs were entitled in a suit in which they had succeeded to tax his costs as attorney against the defendant.

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FLEMING v. WEST.

Ejectment—Estoppel.

John Brown died in 1847, having devised land to his son, John Brown and his heirs, but if he had no children, and should die before his wife Susannah, then to her for life, and at her death to Janet West and her heirs. Janet West and Isaac West, her husband, conveyed the land in 1848 to the John Brown, who, in 1874, conveyed to plaintiff, but Isaac West, having afterwards obtained possession of the land, through his son, to whom it had been leased, refused to deliver it to plaintiff, who brought ejectment.

Held, that the conveyance of Janet West's interest, though it would not have been good if made to a stranger, was valid, as having been made to plaintiff, who had the fee, and, even if not so, that defendants were estopped by their conduct from claiming the land.

CALDWELL v. STADACONA.

Amendment after judgment on demurrer.

An application to amend after argument and judgment on a demurrer stands in a different position from one made before, and the applicant (defendant) should make it appear by affidavit that the defence proposed to be pleaded is founded on fact. Where this was not done, and the pleas which it was proposed to add were clearly demurrable, the Court affirmed the order of a Judge at Chambers refusing leave to amend.

Re CAMERON'S CIRCUS.

Attachments—Priority—Practice—Rescinding order.

The Attorney of A., B. and C., on the 16th July, took out writs of attachment, which were levied on property of the defendant's in Halifax County on July 17th, and on July 19th he issued a writ of attachment, at the suit of D., which was forwarded with the other three writs on the same day to the Sheriff of Hants, where they were levied on defendant's property there. On July 17th, a writ was issued at the suit of E., and levied on the Halifax property on the same day, but subsequent to the levies at the suit of A., B. and C., and on the 19th July a writ was issued and levied on the Halifax property at the suit of F.

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Held, reversing the decision of Young, C.J., who had confirmed the report of the Master, that the property levied on in Hants had been rightly appropriated in the first place to the payment of D.'s claim, and the balance to the claims of A., B. and C.

Held, also, that an appeal from Young, C.J., having been refused, a motion to rescind it could be resorted to.

LYNDS v. HOAR.

R. S. cap. 103—Equity Suit—Waiver—Jurisdiction.

A writ of summons was issued commanding defendants to appear in the Supreme Court, at Truro, at the suit of plaintiffs, who alleged that defendants were indebted for principal and interest on a mortgage, reciting the proviso for redemption. The writ proceeded to set out an amount due on a promissory note of defendants for the same amount as the mortgage, given as collateral security, and prayed that, in default of payment, the equity of redemption should be foreclosed and a sale of the premises made. Defendant treated the suit as one brought in this court under R. S. cap. 103, and not as an equity suit, and pleaded various grounds of defence. The cause was twice tried, and the verdict for defendants was, in each case, set aside by the Court *in banc*. Plaintiff then took a rule *nisi* to rescind the rules setting aside the verdict on the ground that the Court had no jurisdiction, the suit being an equity cause.

Held, that although the writ was not in strict conformity with the procedure pointed out in chapter 103, yet the Court had jurisdiction to deal with the case, not as one brought for the foreclosure of an equity of redemption, but as one in which, on non-payment of the mortgage and note, an order of sale of the premises was sought, and that it was too late to raise the question of want of jurisdiction, grounded on an informality in the writ, which had been waived by defendant's pleading to and defending the cause as an action at common law.

GARDNER v. PAW.

Conviction—Licensed druggist—Breach of liquor law.

Defendant was convicted before the Stipendiary Magistrate for the police division of Yarmouth of having sold intoxicating liquors contrary to law, and appealed to the County Court, contending, that the Stipendiary Magistrate had no jurisdiction, as the act for appointing Stipendiary

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Magistrates, and thus creating a court, was *ultra vires;* that there had been no statement of claim filed before the issue of the writ, as provided by R. S. cap. 91, sec. 3, and that he was justified in selling liquors to be used medicinally by virtue of his being a licensed druggist, although no appointment had been made by the sessions under R. S. cap. 75, sec. 41.

The judgment of the County Court, dismissing the appeal, was affirmed with costs.

O'DONNELL v. CONFEDERATION LIFE INSURANCE CO.

Life policy—Execution.

An action was brought on a policy of life insurance, on the margin of which was a blank printed memo., as follows: "This policy is not valid unless countersigned by————agent, at————countersigned this——day of————187———agent." The Act incorporating the defendant company, made the signature of the President and Vice-President, and general manager, with the common seal of the Association, a sufficient execution of the policy. The policy was thus executed, but not countersigned. The agent swore that it had never been delivered as a policy, but had merely been handed to the party on whose life it was to be effected, for perusal, and that the premium had not been tendered until after the death, by the plaintiff. He also swore, that although the policy was executed in October, 1872, it had remained in his possession until May, 1873, but plaintiff swore that he had seen it in the hands of the deceased in November, 1872, and two others gave similar eveidence.

Held, that on the weight of evidence as to delivery of the policy, the verdict for plaintiff must be sustained, that the condition as to countersigning was not warranted by the charter of the company, and even if it were so warranted, would be entirely inoperative, being only a meaningless blank form on the margin, without signature or seal, and not embodied in the policy.

W. & A. RAILWAY CO. v. W. C. RAILWAY CO.

The Provincial Act of 1867, cap. 36, passed prior to the union of the provinces incorporating the plaintiff company, confirmed a contract between the Provincial Government and the promoters of the company, by which it was mutually agreed that, prior to the opening of the road, a traffic arrangement should be made for the mutual use and employment of their respective lines of railway, including running powers for the joint operation thereof on equitable terms. The Dominion Government, the successor to the Nova Scotia Government, as proprietor of the line from

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Halifax to Windsor called the Windsor branch, entered into an agreement with the plaintiff company, in which there was no provision for a traffic arrangement over both lines, or for the mutual use of the respective lines.

Held, that the agreement was nevertheless valid and binding upon the Dominion Government.

The Dominion Government, by minute of Council in October, 1873, reciting, among other things, that the plaintiffs had failed to operate the Windsor branch, cancelled the agreement of 1871, and transferred the branch in 1877 to the defendant company, under the authority of the Act of the Dominion Parliament, 1874, chapter 16. Evidence was given of negotiations between the companies for an amicable settlement of their respective claims, conducted chiefly by DePass, who styled himself a commissioner of the plaintiff company, but who had no power to settle anything definitely without the consent of the directors.

Held, that the plaintiffs were not estopped from disputing the validity of the cancellation of the agreement of 1871.

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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

In the Supreme Court.

ONTARIO.] [NOVEMBER, 1881.

MERCER v. THE ATTORNEY-GENERAL OF ONTARIO.

Escheat—Hereditary revenue—B. N. A. Act, secs. 102, 109.

The following was the statement of the case agreed upon by the parties:—

This was a suit brought by the Attorney-General for the Province of Ontario to recover from the defendants the possession of a certain parcel of land in Toronto, in the Province of Ontario, part of the real estate of one Andrew Mercer, late of Toronto, who being seized thereof, died intestate and without leaving any heirs or next of kin, on the thirteenth June, 1871. The suit was commenced in the Court of Chancery for Ontario by information on the 28th day of September, A.D. 1878. The defendant, Andrew F. Mercer, demurred to the information for want of equity, and his demurrer was over-ruled, and the Court of Appeal for Ontario affirmed the decision.

Against the judgment of the Court of Appeal the said defendant, Andrew F. Mercer, now appeals to the Supreme Court of Canada. The parties agree that the appeal shall be limited to the broad question as to whether the Government of Canada or of the Province is entitled to estates escheated to the Crown for want of heirs.

Held (Sir W. J. Ritchie, C.J., and Strong, J., dissenting), that escheat being a prerogative right and hereditary revenue of the Crown in Canada, the Province of Ontario does not represent Her Majesty in the exercise of her royal prerogative in matters of escheat in said Province.

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Held, also, per Fournier, Taschereau and Gwynne, JJ., that any revenue derived from escheats, after the full and free exercise of the Crown's prerogative of grace and bounty in favour of any person having claims upon the person whose estate the escheated property was, belongs under sec. 102 of the B. N. A. Act to the Consolidated Revenue Fund of Canada.

W. McDougall and *Lash, Q.C.*, for appellants.

Blake, Q.C., Loranger, Q.C., and *Bethune, Q.C.*, for respondents.

CORBY *et al* v. WILLIAMS.

Contract—Vendor and purchaser—Property in goods—Delivery.

This was a bill filed in the Court of Chancery for Ontario to recover a portion of the amount of a bill of exchange, drawn by the respondent on the appellants, and accepted by them in payment of a cargo of corn, purchased and shipped by the respondent, a commission merchant, residing in Toledo, Ohio, on the order and for account of appellants, distillers, at Belleville, Ont. Upon the arrival at Belleville of the cargo, between the dates of the acceptance and maturity of the draft, the defendants refused to receive it, and afterwards to pay the said draft, alleging the corn to be heated and useless. The respondent sold it for the best price he could obtain, gave credit for the proceeds to appellants on account of their said acceptance, and sued appellant for the balance and interest.

The appellants contended that the respondent was bound by his contract to deliver the corn in good order at Belleville. It was proved the corn was shipped in good condition at Toledo, and that its deterioration took place *in transitu* and before the arrival of the cargo at Belleville. The respondent assigned the bill of lading, together with the policy of Insurance, to the National Bank, Toledo, and drew through them at ten days upon the appellants, endorsing at the same time the bill of exchange for the purpose of vesting the property in the corn in the bank, to hold to their use until the bill of exchange should be paid, and in default of payment, to sell, to reimburse themselves to the amount of the bill of exchange.

Held (Strong, J., dissenting), that the property in the corn remained, by the act of the respondent, in himself and his assignees—the bank—until and after the arrival of the corn at Belleville; and the damage to the corn having occurred while the property continued to be in the respondent and his assignees, the appellants should not bear the loss.

W. Cassels, for appellants.

J. Bethune, Q.C., for respondent.

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QUEBEC.]

COTÉ v. THE STADACONA INSURANCE COMPANY.

Company—Action for calls—Misrepresentation—Repudiation—Acquiescence by receipt of dividend.

In an action to recover the 3rd, 4th, 5th and 6th calls of five per cent. on fifty shares alleged to have been subscribed by the appellant in the capital stock of the respondent company, the appellant by his pleas denied that he ever subscribed for more than five shares, which were fully paid up shares, and alleged that after he had ascertained that he might be held to have only paid ten per cent. on fifty shares, he at once complained to the principal agents of the company, and asked that his subscription be put down at the amount he had in reality meant them to be, and that he believed he would never have anything more to pay on his shares; the pleas also averred misrepresentation and fraud on the part of respondents' agent. The company was incorporated in 1874, and at the trial it was proved that the appellant's subscription was obtained through one of the local agents who received a commission on the shares subscribed, and that the appellant did not know the extent or responsibilities which he assumed, and that the amount set down in the subscription list was entered by the agent without appellant's knowledge or consent. At the end of the year, 1875, the company declared a dividend of 10 per cent. on the paid up capital, and appellant received a cheque for $50, being a dividend of ten per cent. on amount paid "montant verse." In the following year the company suffered heavy losses, and appellant again endeavoured to be relieved from further liability, without success, and calls having been made, he refused to pay.

Held, that, as the appellant immediately after setting his name to the subscription book communicated to respondents the true state of the case, and before any action had been taken by the company upon the faith of the appellant's signature having been obtained, there was no completed contract entered into between them for fifty shares, and that appellant was not estopped by any thing which took place afterwards from shewing that he was never in fact holder of fifty shares in the capital stock of the company.

Languedoc, for appellant.
Bédard, for respondents.

MANITOBA.]

SCHULTZ v. WOOD.

Verbal agreement—Subsequent deed—Vendor and purchaser—Alleged fraudulent representation by vendor—Refusal of Judge to postpone hearing.

The plaintiff, being desirous of securing a residence, entered into negotiations with Dr. Schultz (defendant), to purchase a house which defendant was then erecting. The plaintiff alleged that the agreement was, that he should take the land (2½ lots) at $400 a lot of 50 feet frontage, and the

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materials furnished and work done at its value. In August, 1874, a deed and mortgage were executed, the consideration being stated in both at $5,926. The mortgage was afterwards assigned to the Manitoba and North-West Loan Company. The plaintiff alleged in his bill, that defendant, in violation of good faith, and taking advantage of the plaintiff's ignorance of such matters, and the confidence he placed in the defendant, inserted in the mortgage a larger sum than the balance due as a fair and reasonable market value of the lands, and of what he had done to the dwelling house and other premises, and he prayed that an account might be taken of the amount due.

Defendant repudiated the allegation of fraud, and alleged that plaintiff had every opportunity to satisfy himself, and did satisfy himself, as to the value of what he was getting; that he had told the plaintiff he valued the land at $2,000, and that in no way has he sought to take advantage of the plaintiff. The defendant was unable to be present at the hearing, and applied for a postponement, on the grounds set forth in an affidavit, that he was a material witness on his own behalf, and that it was not safe for him, in this state of health, to travel from Ottawa to Winnipeg.

Dubuc, J., refused the postponement, on the ground that the Court was only asked now to decree that the account should be opened and properly taken, and the amount ascertained, which would be done by the Master, if the Court should so decide, and that the defendant would then have an opportunity of being present, and that he was not necessarily wanted now; and, as the result of the previous evidence, made a decree in accordance with the contentions of the plaintiff, and directed an account to be taken on application of the defendant.

The Chief Justice of the Supreme Court, under sec. 6 of the Supreme Court Amendment Act of 1879, allowed an appeal direct to the Supreme Court of Canada, it being known that there were then only two judges on the bench in Manitoba, the plaintiff (Chief Justice) and Mr. Justice Dubuc, from whose decree the appeal was brought.

Held, that under the circumstances, the case ought not to have been proceeded with in the absence of appellant, and without allowing him the opportunity of giving his evidence.

Per Sir W. J. Ritchie, C.J., Strong and Gwynne, JJ., that on the merits there was no ground shown to entitle the plaintiff to relief, and that the bill ought to be dismissed.

J. Bethune, Q.C., for appellant.
Boyd, Q.C., for respondent.

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ONTARIO.

In the Court of Appeal.

Q. B.] [28TH NOVEMBER, 1881.

ROBINSON v. HALL.

Nonsuit—New trial—Appeal.

The plaintiff being in possession of land as tenant of H., was evicted by the defendant, who claimed under an overdue mortgage. A nonsuit was entered at the trial, on the ground that the defendant was at law entitled to the possession, evidence of equitable rights to possession in the plaintiff being refused. A new trial was directed.

Held, that this Court should not interfere.

Bethune, Q.C., for the appellant.

J. K. Kerr, Q.C., for the respondent.

C. P.]

THE ANCHOR MARINE INSURANCE COMPANY v. THE PHŒNIX INSURANCE COMPANY.

Insurance—Freight—Loss.

The plaintiffs were insurers of a cargo of grain, and the defendants insurers of both hull and freight of the vessel, which was owned by M. The vessel sank during the voyage and damaged the grain. The master refused to deliver it to the plaintiffs, unless his freight were paid. The plaintiffs paid the freight and took an assignment of M.'s policy. Both the owner and the plaintiffs thought it more prudent to take the cargo to Buffalo, as being more saleable there than in Kingston, its original place of destination, which was accordingly done. The plaintiffs now sued on the defendant's policy as assignees of M.

Held, affirming the decision of the Court below (30 C. P. 570) that they were not entitled to recover; for their only rights were those of M., who had suffered no loss for which the defendants were liable, inasmuch as he had been paid his freight.

Maclennan, Q.C., for the appellants.

Robinson, Q.C., and *H. W. M. Murray*, for the respondents.

GILDERSLEEVE v. McDOUGALL.

Contract—Breach—Cause of action—C. L. P. Act, Sec. 49.

The plaintiff, at Kingston, Ontario, after having ascertained the price of forging a cross-head for an engine, wrote to the defendant at Montreal,

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Quebec:—"I am in receipt of your telegram in answer to mine, hoping you will forge cross-head at 7c. per lb, and enclose drawing, which explains itself. Please leave metal enough to finish up to the sizes in the drawing, and ship to me here as soon as finished, per G. T. R." In answer, the defendant wrote:—"Yours of 20th duly at hand, with sketch of cross-head inclosed. The same will have immediate attention, and as soon as ready I will ship to your address." The cross-head was planed in Kingston, where a defect in the forging was discovered, and the beam, after being used on the plaintiff's steamer for several months, broke at the defective point. On a motion to set aside the service of the writ, the plaintiff undertook to prove at the trial a cause of action which arose in Ontario, or in respect of a contract made therein.

Held, reversing the decision of the Court below (31 C. P. 164), that the contract, being to forge and deliver on the G. T. Railway at Montreal, was a contract made in the Province of Quebec, and as the defect in the beam, being the breach of the warranty that it should be reasonably fit for the purpose for which it was made, existed when it left the workshop at Montreal, the breach also occurred in that Province, and the plaintiff should therefore be nonsuited.

McMichael, Q.C., for the appellant.
Bethune, Q.C., for the respondent.

ROBINS v. VICTORIA MUTUAL FIRE INSURANCE COMPANY.

Fire insurance—Loss—Proof within 30 days—Relief from—R. S. O. cap. 162.

Held, affirming the judgment of the Court below, that R. S. O. cap. 162, applies to Mutual Insurance Companies.

Held, also, that the second section of that Act applies to the time within which proofs of loss may be delivered, as well as to the proofs themselves; and the plaintiff, having failed, through accident, to deliver his proofs within 30 days from the loss, was entitled to recover.

Burton, J.A., dissenting.

McCarthy, Q.C., and *Bruce* for the appellants.
Lennox, for the respondent.

PEAK v. SHIELDS.

Insolvent Act of 1864, sec. 8, sub-sec. 7—Insolvent Act of 1875, sec. 136—Fraud in obtaining credit—Contract made abroad—Jurisdiction of Parliament of Canada.

The plaintiffs sued for goods sold and delivered to the defendants, who were insolvents, and, under sec. 136 of the Insolvent Act of 1875, charged fraud in the defendants in procuring the goods on credit, knowing them-

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selves to be unable to meet their engagements, and concealing the fact from the plaintiffs. The defendants were domiciled in Ontario, and the contract was made in England.

Held, affirming the judgment of the Court below (31 C. P. 112), that the act charged was not a crime, nor were the proceedings criminal, but that the Statute gave an additional remedy for the recovery of the debt; and it made no difference, therefore, that the contract was made in England.

Per Spragge, C.J.O. (Morrison, J.A., concurring). Section 136 of the Insolvent Act of 1875, dealing with matter of procedure incident to the law of Bankruptcy and Insolvency, was within the jurisdiction of the Parliament of the Dominion of Canada to enact.

Per Burton, J.A. This section, which gives certain creditors a remedy for the recovery of their debts in full, is contrary to the policy of insolvency laws, which aim at a rateable distribution of the assets among all the creditors of the insolvent, and does not properly come under the head of Bankruptcy and Insolvency, and is, therefore, *ultra vires* of the Parliament of Canada. But section 8, sub-sec. 7, of the Insolvent Act of 1864, to the same effect, is still in force, the Parliament of Canada having no power to repeal it.

Per Patterson, J.A. The plaintiff is entitled to recover whether sec. 136 of the Insolvent Act of 1875 is *ultra vires* or not; for the Parliament of the Dominion of Canada either had power to deal with the subject of this section, in which case it would be binding; or it had not power to do so, in which case the same enactment in the Insolvent Act of 1864 is unrepealed and in force.

Bethune, Q.C., for the appellants.
Rose, Q.C., for the respondents.

FULL COURT OF CHANCERY.]

WATSON v. LINDSAY.

Unpatented lands—Mortgage—Sale under power—Patent—Statutes of Limitations.

D. A. C., being the locatee of the Crown, in 1860 mortgaged the north half and the south half of the land by two mortgages to McM. In 1865, he died. In 1870, McM. assigned one mortgage to D., and in 1874 he assigned the other. In 1875, the patent of the north half issued to one Campbell, who paid the purchase money due the Crown on the whole lot at the request of M. C. and H. C., the widow and son respectively of D. A. C., and patents of the east and west halves of the south half, issued to M. C. and A. C. respectively, without intending (as shown by the memo. in the Crown Lands Department), to cut out the rights, if any, of D. under his mortgage. In 1876, D. sold under the power in his mortgage to L., who, in 1877, made a mortgage to the plaintiff on which this suit was brought. D. A. C., M. C. and A. C. had, in the meantime, always occupied the land without paying interest, and they claimed title by possession.

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Held, affirming the decision of the Court below (27 Gr. 253), that the Statute of Limitations having commenced to run, was not interrupted either by the sale under the power in D.'s mortgage, which conveyed only the estate which D. had, or by the granting of the land by patent in 1875.

Black and *Francis*, for the appellant.

J. K. Kerr, *Q.C.*, and *Beck*, for the respondents.

SPRAGGE, C.)

THE ATTORNEY-GENERAL OF ONTARIO *ex rel.* BARRETT v. THE INTERNATIONAL BRIDGE COMPANY.

Injunction—Bridge Company—Specific performance of Act of Parliament —Locus standi of Attorney-General of Ontario.

The defendant company was incorporated for the construction of a bridge from Canada to the United States across the Niagara river, which was to be, "as well for the passage of persons on foot, and in carriages, and otherwise, as for the passage of railway trains." The company completed the bridge for railway purposes only. The time limited by the charter for the completion of the work having elapsed, an information was filed, seeking to restrain the use of the bridge by a railway company to which the bridge had been leased, until put into condition for ordinary traffic, or for the removal of the bridge as a nuisance, and to compel permission of its use by foot passengers on payment of the statutory tolls. The bridge, owing to engineering difficulties, could not be adapted to the use of carriages and foot passengers.

Held, reversing the decree of Spragge, C. (28 Gr. 65), that the abandonment of that portion of the work which was to have accommodated foot passengers and carriages was not a public nuisance, but probably an abuse of the Act of Incorporation; that the Act of Incorporation was not a contract with the public, but merely gave conditional powers, creating correlative duties; that the Act was permissive, and specific performance thereof would not be enforced.

Held, also, that the Attorney-General for Ontario, as representing only a limited portion of the public with whom, if at all, such a contract existed, had no *locus standi*.

The work being one within the jurisdiction of the Parliament of Canada, the Attorney-General of Canada, presumably with the knowledge of the state of the bridge, allowed debentures to be issued charged upon it.

Held, that upon this ground, also, the Attorney-General of Ontario was not the proper party to file the information.

Held, also, that, as the bridge extended beyond the limits of the Province, part only being therein, it would be unavailing for the Court to give the public the right to pass over that part of the bridge only which was within its jurisdiction; and for this reason, also, the Court would not interfere.

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LOWSON v. THE CANADA FARMERS' INSURANCE COMPANY.

Mutual insurance—Proprietary policy.

The defendants were authorized by their charter to carry on both proprietary and mutual insurance business; but they were debarred from taking risks which were extra hazardous in the mutual branch. The plaintiff's property, falling within the prohibited class, was insured with the defendants, and he gave a premium note, instead of making a cash payment, but the policy issued to him was not a mutual policy, but an absolute undertaking to pay the loss. He also paid several assessments.

Held, reversing the judgment of the Court below, that the policy was not a mutual one, there being nothing except the premium note (which was not conclusive) to indicate that it was a mutual insurance, and the property being of such a nature that it could not be insured in the mutual branch.

Crooks, Q.C., and *Cattanach*, for the appellant.
Maclennan, Q.C., and *W. Cassels*, for the respondents.

PROUDFOOT, V.C.]

GRIFFITHS v. PERRY.

Insolvent Act of 1875, secs. 130, 132—Fraudulent preference.

The plaintiffs, who were sub-contractors for the stone and brickwork of a public school, and who were to receive payment from the principal contractors, who were the only contractors recognized by the Public School Board, procured an assignment to themselves of the balance due them by the contractors for their completed work, and payable to the contractor by the Board. The contractors were, at the time, unable to pay their debts, which the plaintiffs knew, and an attachment in insolvency issued against them within three months after the assignment of the claim.

Held, affirming the decision of the Court below, that the assignment was a contract within the meaning of sections 130 and 132 of the Insolvent Act of 1875, and the plaintiffs could not maintain a bill to enforce payment of the balance assigned to them.

Bain, for the appellant.
W. Cassels, for the respondents.

DAVIDSON v. OLIVER.

Will, construction of—Legacy—Condition.

A., by the 3rd clause of his will, devised and bequeathed the residue of his estate to his wife, four sons and two daughters, the devise and bequest being subject to the condition that they all unite in paying to the execu-

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tors the money for the legacies to two of the sons, Alexander and Duncan. By the 4th clause he gave the legacies without condition to Alexander and Duncan. By the 5th clause he devised to his sons Douglas and Oliver two lots; and after giving several legacies to his daughters he proceeded, "and further, that Alexander and Duncan work on the farm until the legacies become due." Alexander left the farm and entered into mercantile pursuits.

Held, affirming the decision of the Court below (Patterson, J.A., dissenting), that Alexander was entitled to the legacy absolutely, and that the testator's wish that he should work on the farm was not a condition precedent to his right thereto.

Moss, for the appellant.

Boyd, Q.C., for the respondent.

SCOTTISH AMERICA INVESTMENT COMPANY v. THE CORPORATION OF THE VILLAGE OF ELORA.

Municipal Corporation—Loan for encouragement of industry—Power to loan—Debentures—Rate of interest on.

Held, affirming the decision of the Court below, that a municipality, acting under 36 Vict. cap. 48, sec. 372, sub-sec. 5 (O.) has power to lend money for the encouragement of any branch of industry, notwithstanding the use of the word "bonus" therein, which does not necessarily import a gift; and they are therefore liable on their debentures issued for the purpose of raising money to be so lent.

The rate of interest payable on the debentures was seven per cent.

Held, that section 217 of 29-30 Vict. cap. 51, has not been repealed, though marked "effete" in the Schedule to, and not re-enacted in, 36 Vict. cap. 48 (O.), and that the above rate was lawful.

Jacob, for the appellants.

Robinson, Q.C., and *Bruce*, for the respondents.

McEDIE v. WATT.

Collusive judgment—R. S. O. cap. 118.

Held, affirming the decision of Blake, V. C., that the cases under the Absconding Debtors Act do not apply to cases coming under R. S. O. cap. 118.

Labatt v. *Bixel*, 29 Gr. (not yet reported) approved and followed.

Gibbons, for the appellant.

R. C. Smith, for the respondent.

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CALVERT v. BURNHAM.

Specific performance of agreement to lend—Cloud on title—Mortgage—Demurrer.

A bill alleged that a mortgage was executed by W. to the defendant in consideration of $450, that the defendant advanced only $150 thereon, and W. being entitled to receive the balance conveyed his equity of redemption to the plaintiff and assigned the rights to receive the balance, that the defendant refuses to pay the balance, and claims to hold the mortgage as security for $450. The prayer was for specific performance, or, in the alternative, a declaration of the above facts and for general relief. At the hearing the learned Judge allowed a demurrer *ore tenus*, on the ground that an agreement to lend money would not be specifically performed.

Held, reversing this judgment, that, upon the facts alleged in the bill, viz., that the mortgage was being held for more than had been advanced thereon, and therefore to that extent formed a cloud upon the title, the plaintiff would be entitled to a declaration to that effect and appropriate relief, and as the demurrer admitted the truth of the allegation it should have been over-ruled.

Bethune, Q.C., and *Poussette*, for the appellant.
E. Blake, Q.C., for the respondent.

C. C. YORK.]

BANK OF MONTREAL v. GILCHRIST.

Landlord and tenant—Attornment—Title.

S. being indebted to the plaintiffs, entered into an agreement amongst other things to mortgage to them certain lands (amongst others) known as the Dominion Hotel property. A mortgage was the same day executed, but by mistake the Dominion Hotel property was omitted therefrom, and a lot formerly own by S. adjacent thereto inserted. The defendant had been the tenant of S., and after the mortgage attorned and paid some rent to the plaintiffs, believing them to have a title to the lands. This action was for arrears of rent.

Held, affirming the decision of the Court below, that, after such attornment and payment of rent, the defendant could not be heard to deny the plaintiffs' title, and they, being the equitable owners of the land, were entitled to recover.

Held, also, that the title thus not being open to question the County Court had jurisdiction.

Tilt, for the appellant.
Ferguson, Q.C., for the respondent.

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BOOTH v. PRITTIE.

Yearly hiring—Defeasible contract—Statute of Frauds.

Held, reversing the decision of the Court below, that a contract of hiring for a year or more, defeasible within the year, is within the 4th section of the Statute of Frauds.

Maclennan, Q.C., for appellant.
J. McGregor, for the respondent.

SATO v. HUBBARD.

Garnishee proceedings—County Court—Appeal.

There is no appeal from an order made in garnishee proceedings in a County Court, appeals from the County Courts being expressly limited to the cases mentioned in section 35 of the County Courts Act. Section 200 of the C. L. P. Act does not give a general appeal from the County Courts, being controlled by the sub-heading preceding section 189.

Beaty, Q.C., for the appellant.
Tilt, for the respondent.

WATSON v. SEVERN.

County Court—Liquidated demand—Jurisdiction—Corroboration.

K. sold to S. (the defendant's testator) a quantity of goods, which the former in his evidence said was a definite quantity—which he could not recollect, but not less than 30 hhds., and not more than 40—at the price of $10 per hhd. The plaintiff sued for the price of 30 hhds.

Held, that the demand was liquidated by the act of the parties at the time of the sale, and that the action was within the jurisdiction of the County Court.

K. had assigned to the plaintiff the moneys due him by S.

Held, that K., who was a witness, was not "an opposite or interested party to the suit," within the meaning of the Evidence Act, and his evidence did not require corroboration as against the executors of S.

Tilt, for the appellant.
Delamere, for the respondent.

C. C. PEEL.]

ANDREWS v. STUART.

Assignment for creditors—Revocable deed—Preference—R. S. O. cap. 118. sec. 2—Surprise.

A deed of stock in trade and lands was made by B., an insolvent debtor to the plaintiff, in trust to convert the same into money, pay the expenses

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of the trust, retain 10 per cent. of moneys received by way of compensation, and to pay "the present execution and other privileged creditors, if any, according to privilege, and in such amounts as they might agree to receive, next to divide the balance *pari passu* among all other creditors, and to pay the surplus, if any, to B." The plaintiff took possession under the deed. The trustee was not a creditor, and there was no evidence of any acceptance of the deed by any of the creditors. The defendant seized under an execution a few days after the deed.

Held, affirming the judgment of the Court below, that the deed was a revocable, voluntary instrument, the relation of trustee and *cestui que trust* not having been established between the plaintiff and the creditors, and, therefore, was void as against the defendant.

Held, also, that it was void under R. S. O. cap. 118, sec. 2, as it did not provide for the paying rateably and proportionably, and without preference or priority, all the creditors, but gave a preference to others besides existing execution creditors.

The abstaining of a party from proof under an idea that his adversary had no real intention of putting him to such proof, and being thereby taken by surprise, is not a ground for granting a new trial.

J. A. Paterson, for the appellant.
Bruce, for the respondents.

C. C. NORTHUMBERLAND AND DURHAM.]

WATSON v. BRADSHAW.

Promissory note—Gift inter vivos.

The plaintiff had performed services for one P. in his lifetime; and he, intending to make some recognition thereof, told her that a certain promissory note, payable to himself, was hers, saying,—"Here is your note; take it when you want it." The plaintiff told P. to keep it for her as she had no place in which to keep it, and he did so.

Held, affirming the decision of the Court below, that the gift was not complete.

Moss, Q.C. (with him *R. R. Loscombe*), for the appellant.
J. K. Kerr, Q.C., for the respondent.

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High Court of Justice.

COMMON PLEAS DIVISION.

[ARMOUR, J., NOVEMBER, 1881.

PARKER v. PARKER.

Executrix—Action against—Corroborative evidence—R. S. O. cap. 62, sec. 10.

Held, that, under section 10 of the Evidence Act, any evidence adduced by a party interested against an executrix corroborating the evidence of the interested party in any particular, must be submitted to the jury as sufficient corroboration in point of law, the weight to be attached to it in point of fact being a matter for their consideration.

Orr v. *Orr*, 21 Gr. 397, and *McDonald* v. *McKinnon*, 26 Gr. 12, commented upon.

McMichael, *Q.C.*, for the plaintiff.

Moss, *Q.C.*, and *Falconbridge*, for the defendant.

[OSLER, J., NOVEMBER, 1881.

BOSWELL v. SUTHERLAND.

Contract—Impossibility of performance—Destruction of goods by fire.

The defendant by bond bound himself to produce the goods and chattels embraced in a chattel mortgage given by P. to the plaintiff on P.'s default in payment, so as to enable the plaintiff to seize and sell them under the mortgage.

Held, that a contract of this kind is subject to the implied condition that, if before breach performance becomes impossible because the specific articles have without default of the obligor ceased to exist, performance is excused; and therefore to an action on the bond alleging such default, a plea setting up that before breach and without default on the defendant's or P.'s part the goods were destroyed by fire was a good answer.

BENNET v. THE UNION INSURANCE COMPANY.

Pleading—Non est factum—Effect of—Rules 141, 493.

To a declaration on a policy of insurance made by defendants, but not averring that it was made under the corporate seal, the defendants pleaded *non est factum*.

Held, plea good; for that the declaration sets forth a complete instrument, a policy of insurance made by defendants, a corporation, and this *ex vi termini* imports a seal, but in any event the plaintiff cannot be embarrassed by the plea, as it must, under Rules 141 and 493, be treated as a mere denial of the making of the contract of insurance in fact, and not of its legality or sufficiency in law.

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CHANCERY DIVISION.

[PROUDFOOT, J., 7TH DECEMBER, 1881.

THE PUBLIC SCHOOL BOARD OF NAPANEE v. THE MUNICIPAL CORPORATION OF NAPANEE.

Mandamus—Return.

The mode of procedure, when a return has been made to a mandamus *nisi* and the plaintiffs are not satisfied with it, is to demur, plead to or traverse the return, to which the defendants may reply, take issue or demur.

In re NEIL; DICKEY v. NEIL.

Receiver—Costs.

The necessity for a Receiver's obtaining the sanction of the Court before commencing suits is for the protection of the fund. Where he proceeds without this sanction he will in general be refused his costs, though costs may be allowed him if his action has been beneficial to the fund.

Where a Receiver in such a case brought a suit without meaning to look to the fund.

Held, that he had a right to do so, and the defendant could not object to his obtaining the relief with costs.

RODY v. RODY.

Dower—Election.

A testator appointed three executors, and directed that his real estate should be leased to one of them until J. R. and J. should attain twenty-one. There were also benefits conferred upon his widow by the will.

Held, that his widow was bound to elect.

DRYDEN v. WOODS.

Will—Construction of.

A testator directed that, at the death of his wife, if she survived him, all his estate (with certain exceptions) should be sold, and the proceeds equally divided among his four daughters and three sons and their children, after paying $200 to each of the three children of his deceased daughter R. He left surviving him his widow who was still living, three sons and four daughters and twenty-seven grandchildren. Two of the grandchildren were born after the date of the will but before the testator's death, and one was born after his death.

Held, that all the children and grandchildren would take concurrently who were in existence at the death of the widow; but as other grandchildren might still come into being who would not be bound by the present proceedings, the Court declined to make an order.

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McDONALD v. FORRESTAL.

Sale of goods—Passing of Property.

The plaintiffs shipped crude oil to A., who was a refiner, on the agreement that the property should not pass till A. made certain payments. A., without making the payments, sold to the defendant, without the knowledge of the plaintiff, who dealt with A. as a refiner only.

Held, following *Hyman* v. *Walker*, 1 App. 345, that the plaintiff was entitled to judgment against the defendant for the price of the oil.

LEE v. THE CREDIT VALLEY RAILWAY CO.

Creditors' suit—Receiver discharged—Creditors' rights.

A Receiver was appointed, under the decree in this suit to collect revenue, and, after paying expenses, to pay the balances into Court, which were to be paid out on the report of the Master to the parties entitled as found by him. The plaintiff, pursuant to advertisement for creditors, proved his claim. The Master had not made his report. By 44 Vict. cap. 61 (O.), the defendants were authorized to pledge the bonds or debenture stock to be issued thereunder, and the proceeds were to be paid out on the order of C. and F. who were appointed creditors' trustees, in payment of all moneys necessary to be paid for the discharge of the Receiver in this suit. An order of Court was made, on the application of the defendants, discharging the Receiver without providing for the payment of claimants who had proved under the decree. The Act directed that all who came in under it should take fifty cents on the dollar.

Held, that the position of affairs having altered since the time at which the plaintiff had proved his claim, he was not bound thereby, and should not be restrained from prosecuting an action for his debt to recover the full amount, if possible.

HILLOCK v. BUTTON.

Marriage Settlement—Improvidence—Power of Revocation.

The absence of a power of revocation from a voluntary settlement is not a ground for setting it aside.

The plaintiff, who had just come of age, being about to marry, applied to her solicitor who was also her guardian, for advice as to her property, and had several consultations with him, at which the heads of a marriage settlement were agreed upon. The solicitor did not know the husband, and acted solely in the interests of the plaintiff. Nothing was said about a power of revocation in the settlement, which contained the usual clauses, but gave rather more power than usual to the plaintiff, and was made in consideration of marriage.

Held, that it was not a voluntary settlement; and that, as it contained the usual clauses in such deeds, and simply omitted a power of revocation which is not usual in settlements for value, there was no evidence of improvidence, or ground for setting it aside, in the absence of fraud or mistake.

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WRIGHT v. THE SYNOD OF THE DIOCESE OF HURON.

Licensed Parson—Right to share in diocesan funds—Vested rights.

Semble, that a written license to a parson is not necessary in the Diocese of Huron; but if, in strictness, necessary, the defendants having put the plaintiff's name on the list of clergy entitled to share in a certain fund, were estopped from taking the objection in a suit to enforce payment out of the fund.

The church society of the Diocese of Huron received certain funds, and, having invested them, appointed a committee to consider the future application of the surplus of a fund called the commutation fund. On the report of the committee a by-law was passed, enacting that every clergyman not under ecclesiastical censure, of eight years' and upwards active service in the diocese, not on the commutation fund, or not receiving a salary, etc., should be entitled to $200 per annum. Under this by-law, the plaintiff was placed on the list of clergymen to receive $200 per annum from the surplus interest of the commutation fund, and received it for some time. The defendants succeeded to the church society by Act of the Legislature.

Held, that the plaintiff had a vested right in the surplus interest, of which he could not be deprived as long as he came within the conditions of the by-law under which he was placed on the fund; and a subsequent by-law repealing all former by-laws, and declaring that all prior grants made in pursuance of prior by-laws should cease, could not affect his vested rights.

IN CHAMBERS.

[THE CHANCELLOR, 29TH NOVEMBER, 1881.

THE CANADIAN BANK OF COMMERCE v. BRICKER.

Foreclosure—Appearance—Final judgment—Rule 80—Cross-examination on affidavit.

In an action for foreclosure, the writ was endorsed pursuant to rule 17 for foreclosure, possession and immediate payment under the covenant. Upon appearance the plaintiff moved for final judgment under rule 80, and the defendant filed affidavits imputing fraud to the plaintiff's agent, who had obtained the mortgage.

Held, affirming the decision of the Master in Chambers that the case was not within rule 80, which applies only to actions where the suit is endorsed pursuant to rule 14, a different procedure having been contemplated for the various claims in mortgage cases.

Held, also, that the Master had rightly refused to allow cross-examination on the affidavit filed, inasmuch as the motion was not properly made.

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[PROUDFOOT, J., 5TH DECEMBER, 1881.

SMITH v. BABCOCK.

Foreign Commission—Issue of pursuant to order.

By an order in the suit it was directed that a commission might issue for the examination upon oath of R. M. *viva voce* as a witness etc., and of any member or members of the firm of C. M. & Co. or persons in the employ of such firm as witnesses upon interrogatories, on behalf of the defendant. The defendant applied to the Clerk of Records and Writs for a commission to issue under the order without having filed any interrogatories, stating that at present he only desired to examine R. M. *viva voce*, and not to act on the second part of the order. The Clerk of R. & W. refused to issue the commission except in the terms of the order. An application was made for a direction to the Clerk of Records and Writs to issue the writ as requested.

Held, that the Clerk had acted properly in refusing to issue the commission except according to the full terms of the order. Liberty was given to the defendant to amend his order and take it for the examination of R. M. *viva voce* alone.

A. Hoskin, Q.C., for the application.

ANONYMOUS.

Mortgage—Married woman—Separate estate.

A mortgage, pursuant to the Short Forms Act, was made by a married woman and another as mortgagors, containing the usual covenants for payment. There was no allegation in the bill that the married woman had any separate estate.

Held, that no personal order for payment could, on this bill, be made against the married woman, there being no allegation of separate estate.

W. Fitzgerald, for the motion.

[THE MASTER IN CHAMBERS, 8TH DECEMBER, 1881.

DRIVER v. CANADA PERMANENT L. & S. CO.

Parties—Rule 107.

The defendants held a surplus after selling mortgaged lands and paying themselves off, which the plaintiff and H. D. and W. D. claimed. The plaintiff, not admitting the account, commenced an action to recover the surplus from the defendants, who applied to have H. D. and W. D. made parties, in order that the whole matter in dispute might be disposed of. The defendants claimed an interest in a small portion of the surplus as

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assignees of a judgment against the plaintiff. An interpleader order had been refused by Proudfoot, J.

Held, that they were proper parties, and should be added.

Geo. A. Mackenzie, for the motion.

Geo. H. Watson, contra.

In the Queen's Bench.

[17TH MAY, 1881.

WILLSON v. THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF YORK.

Award—Validity of—Umpire—Municipal officer—Dismissal.

Municipal officers appointed by the Council hold office during the pleasure of the Council, and may be removed without notice and without cause.

To an action for wrongful dismissal and on the common counts the defendants pleaded an award, by which all matters in dispute between the parties had been settled. The submission was to S. and N., "and such third person as the said arbitrators should appoint, so that the said arbitrators or umpire make his or their award * * by the 15th January, etc." The arbitrators, or any two of them, had power to enlarge the time for making the award. Before entering upon their duties S. and N. appointed E. as third arbitrator, and the award was executed by S. and E. only, and professed to be the award of the arbitrators.

Held, that E. was not an umpire, but a third arbitrator, and the word "umpire" in the submission should be rejected as surplusage; and the award not having been made by the three arbitrators was invalid.

J. K. Kerr, for the plaintiff.

McMichael, Q.C., for the defendants.

NOVA SCOTIA.

In the Supreme Court.

ANDREWS v. BONNETT.

Bill of sale—Estoppel.

One Mosher conveyed a number of horses and cattle to plaintiff by bill of sale as security for the alleged debt. Mosher exchanged one of the horses for a colt. This he afterwards, at plaintiff's request, exchanged for another horse, which he delivered to plaintiff, but plaintiff requested Mosher to keep him. He did so, and fed the horse with the hay transferred to him by the bill of sale. The Judge of the County Court considered the evidence of the debt, which formed the consideration of the

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bill of sale, unsatisfactory, but he negatived fraud in the transaction. He also considered that the estoppel which would otherwise arise against plaintiff ceased to operate after notification by plaintiff to the defendant of his claim of property in the horse.

Held, that the decision of the Judge of the County Court for plaintiff must be affirmed.

Per Des Barres, J., that the evidence of the dealings between defendant and plaintiff did not show any fraud.

Per James, J., that there was no estoppel at any stage of the transaction.

Per McDonald, J., that, even assuming that the bill of sale was void, the horse could not be levied on, as it never had been the property of Mosher, but was the property of the plaintiff, however obtained.

Weatherbe, J., *dubitante*.

THE QUEEN v. TOBIN.

Forfeiture of mine—Service of notice— Style of cause—Filing affidavits.

Proceedings were had before the Deputy Commissioner of Mines at Halifax to obtain the forfeiture of a mining property at Montague, owned by the defendant. The defendant resided at Londonderry, and had agents at Montague, but no service of notice was made on either him or them, and neither he nor they knew anything of the proceedings until after the areas were forfeited. The notice was posted by a person who appeared to be interested in procuring the forfeiture, and who swore that neither Tobin nor any agent or person employed on the premises could be found *in the district* on whom personal service could be made. The matter being brought up by *certiorari*,

Held, that, in order to dispense with personal service, evidence should have been given of a *bona fide* search, or that defendant was out of the Province.

The party applying for the forfeiture entitled the proceedings below "The Queen v. Tobin."

Held, that the appellant had a right to use the same title in the subsequent proceedings in this Court.

A rule was granted to compel the parties sustaining the forfeiture to file their affidavits on a day previous to the hearing, to be named by the Court.

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